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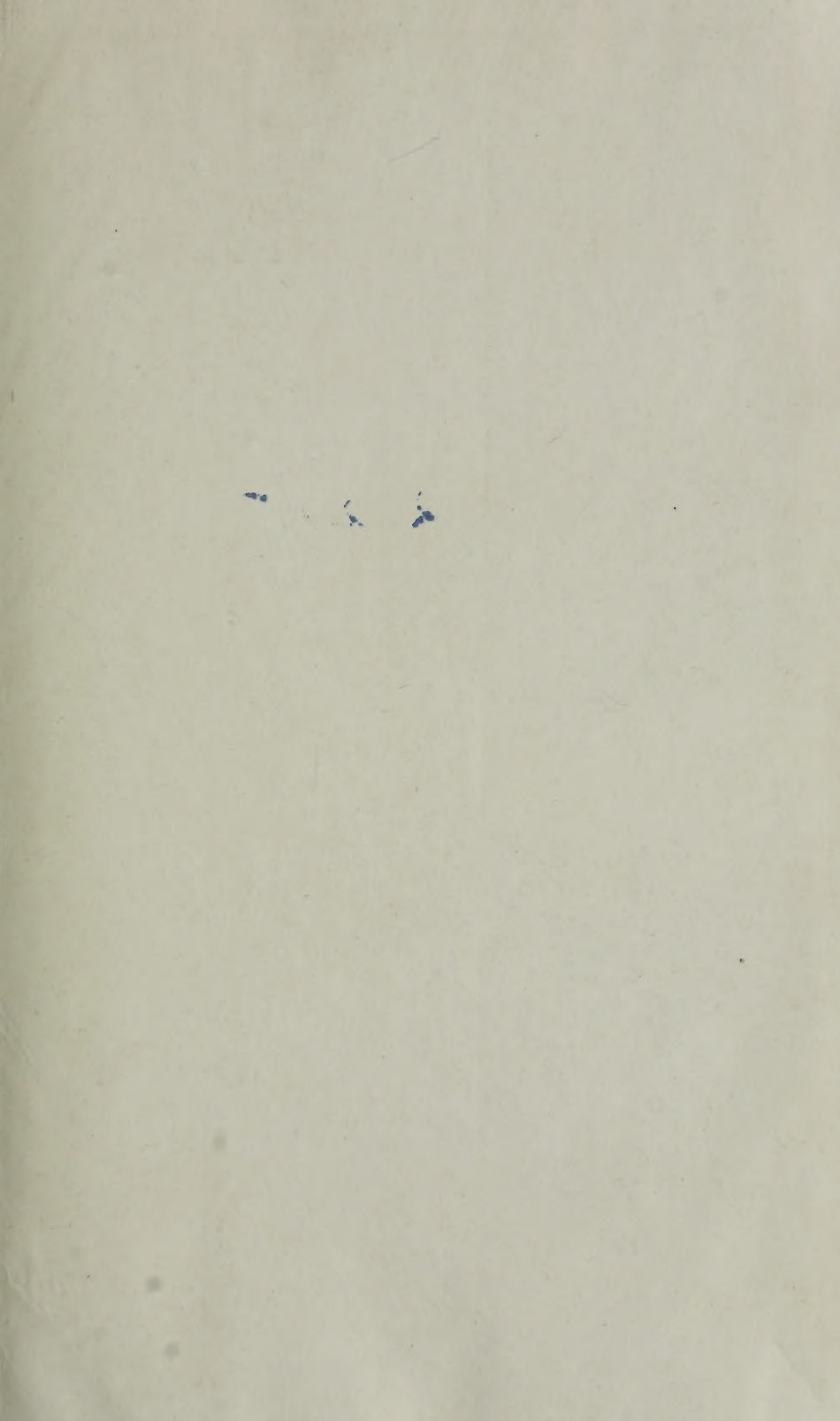
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No. 11147 2418

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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COFFIN-REDINGTON COMPANY, a corporation,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

OCT 30 1945

PAUL P. O'BRIEN,  
CLERK





No. 11147

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

Attorneys for Defendant and Appellant.

Mr. W. H. BRUNNER,  
Office of Price Administration,  
1355 Market Street,  
San Francisco, California.

Attorney for Plaintiff and Appellee.



In the District Court of the United States North-  
ern District of California Southern Division

No. 23628-R

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

COFFIN-REDINGTON & CO., a corporation, 311  
Folsom Street, San Francisco, California,  
Defendant.

### COMPLAINT FOR INJUNCTION

1. In the judgment of the Price Administrator, the defendant has engaged in actions and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942, as amended, (Pub. Law 421, 77th Cong., 2d Sess., c. 26, 56 Stat. 23), hereinafter called "the Act", in that defendant violated Maximum Price Regulation No. 445, as amended and revised, effective in accordance with the provisions of the Act; and, therefore, pursuant to Section 205 (a) of the Act, the Price Administrator brings this action to enforce compliance with the Regulation. [1\*]

2. Jurisdiction of this action is conferred upon this Court by Section 205 (c) of the Act.

3. From and including August 14, 1943, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 445, as amended and revised,

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

establishing maximum prices for distilled spirits and wines.

4. Subsequent to August 14, 1943, defendant, doing business in the City and County of San Francisco, State of California, sold distilled spirits at prices higher than the maximum prices permitted by said Regulation.

5. Subsequent to August 14, 1943, defendant, doing business in the City and County of San Francisco, State of California, sold imported whiskey or domestic whiskey in case lots, and less, only on condition that the purchaser accept delivery also of and pay for one or more, or less, cases of imported or domestic rum, gin, tequila, vodka, or other beverages, including imported or domestic wines, in addition to the imported or domestic whiskey ordered and purchased by the purchaser, and said defendant subsequent to said date thereby sold imported whiskey or domestic whiskey at prices higher than the maximum prices permitted by said Regulation, as amended and revised.

Wherefore, the Administrator demands:

A. A final injunction enjoining defendant, its agents, servants, employees, attorneys, and all persons in active concert or participation with the defendant, from

Directly or indirectly selling or delivering distilled spirits and wines at prices in excess of the maximum prices established by Maximum Price Regulation No. 445, as amended and revised, or as hereafter amended or revised, [2] or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

B. A final injunction enjoining the defendant, its agents, servants, employees, attorneys, and all persons in active concert or participation with the defendant, from

Directly or indirectly selling or delivering imported whiskey or domestic whiskey to purchasers who ordered the same and whose orders are accepted by defendant only on condition that such purchaser accept delivery also of and pay for imported or domestic rum, gin, tequila, vodka, or other beverages, including wines, or any other commodity; and from directly or indirectly selling or delivering imported whiskey or domestic whiskey, or other distilled spirits and wines, at prices in excess of the maximum prices established by Maximum Price Regulation No. 445, as amended or revised, or as hereafter amended or revised, or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

C. Such other, further and different relief as to the Court may seem just and proper in the premises.

THOMAS C. RYAN

GEORGE A. FARADAY

[Endorsed]: Filed Aug. 28, 1944. [3]

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[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and answers the complaint on file herein as follows:



## I.

Answering paragraph 1 of said complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the judgment of the Price Administrator; denies that it has engaged in any action or actions or practice or practices which constitute a violation or violations of Section 4 (a) of the Emergency Price Control Act of 1942, as [4] amended; and denies that it has violated Maximum Price Regulation No. 445, as amended and revised.

## II.

Answering paragraphs 4 and 5 of said complaint, defendant denies each and every, all and singular, generally and specifically, the allegations contained therein.

Wherefore, defendant prays that:

1. The final injunctions demanded by plaintiff be denied;
2. The complaint filed herein be dismissed; and
3. Defendant be awarded such other relief as to the Court may seem just and proper in the premises.

THOMAS, BEEDY, NELSON &  
KING

Attorneys for Defendant

Of Counsel

LOUIS S. BEEDY  
JOHN BENNETT KING

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 21, 1944. [5]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO  
PLAINTIFF BY DEFENDANT PUR-  
SUANT TO RULE 33 OF THE FEDERAL  
RULES OF CIVIL PROCEDURE.

The above named defendant, having heretofore on the 21st day of October, 1944, served upon plaintiff and filed with the Clerk of this Court its Answer to the Complaint for Injunction on file herein, hereby propounds the following interrogatories to said plaintiff:

1. State with reference to each alleged sale involved in paragraph 4 of the said complaint the following: [6]

(a) The date and place of sale.

(b) The name and address of the purchaser.

(c) The serial number of the seller's invoice or delivery order.

(d) The distilled spirits sold and delivered, specifying the variety, trade name, unit and amount.

(e) The unit price and total price charged and the maximum unit price and total price legally chargeable.

(f) The terms and conditions of sale, if any, not shown on the seller's invoice or delivery order.

(g) The name and address of the person or persons ordering the merchandise, the date on which it was ordered, and the name of the person or persons from whom it was ordered.

(h) If the merchandise was ordered orally, the

parties to the conversation during which the order was placed, the time and place of the conversation, the persons present, and a statement of the substance of the conversation.

(i) If the merchandise was ordered by writing, the date and serial number of the purchaser's requisition and the name of the person signing the same.

2. State with reference to each alleged sale involved in paragraph 5 of the said complaint the following:

(a) The date and the place of sale.

(b) The name and address of the purchaser.

(c) The serial number of the seller's invoice or delivery order.

(d) The whiskey and other beverages sold, specifying [7] as to each the variety, trade name, unit and amount.

(e) The unit price and total price charged and the maximum unit price and total price legally chargeable.

(f) The terms and conditions of sale, if any, not shown on the seller's invoice or delivery order.

(g) The name and address of the person or persons ordering the merchandise, the date on which it was ordered, and the name of the person or persons from whom it was ordered.

(h) If the merchandise was ordered orally, the parties to the conversation during which the order was placed, the time and place of the conversation, the persons present, and a statement of the substance of the conversation.



(i) If the merchandise was ordered by writing, the date and serial number of the purchaser's requisition and the name of the person signing the same.

3. State the section or sections and subdivision or subdivisions thereof, if any, of the Regulation mentioned in the said complaint which the defendant is alleged to have violated.

4. Do the acts set forth in paragraph 4 of the said complaint constitute alleged violations separate and distinct from those alleged in paragraph 5 thereof, or do the acts set forth in said paragraph 5 constitute a statement of the manner in which the alleged violations set forth in the said paragraph 4 occurred.

Wherefore, defendant demands that plaintiff answer, separately and fully, in writing and under oath, the foregoing interrogatories.

Dated this 28th day of November, 1944.

THOMAS, BEEDY, NELSON &  
KING

Attorneys for Defendant.

[Endorsed]: Filed Dec. 26, 1944. [8]

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[Title of District Court and Cause.]

### ANSWERS TO INTERROGATORIES

In response to interrogatories propounded by defendant in the above entitled action, plaintiff sets forth the following:

1. The sales of which plaintiff complains in Paragraph 4 of said complaint were all made in the City and County of San Francisco, and were made to the following persons:

(a) I. N. Lasser, Manager, Carlos Wines & Liquors, 2080 Chestnut Street, San Francisco, California.

(b) Giovanni Mori, doing business as Gilman Liquor Store, 1316 Gilman St., Berkeley, Calif. [9]

(c) Mattie Parker, doing business as West Berkeley Pharmacy, 1523 San Pablo Ave., Berkeley, California.

(d) A. Ferroni, doing business as Transport Cafe, 1901 Union Street, San Francisco, California.

(e) Edith Gelsi, doing business as Gelsi's Place, 6278 Mission Street, San Francisco, California.

2. In each sale herein referred to, defendant delivered to said purchasers certain unwanted, unordered and slow-moving items of liquor, which items were invoiced and charged to the account of such purchasers and for which such purchasers were forced to pay. In all instances these unwanted items were added to the order.

3. There follows a schedule of the sales made above, keyed by sub-head to the various purchasers listed in Paragraph 1 above. The unwanted items on each invoice are designated with an asterisk (\*) after the item on the schedule.

Pur-chaser	Date	Inv. No.	Item	Item Price	Inv.Total
(a)	6/30/44	46505	2 Cs Marin Rum Gold	\$75.14*	
			1 Cs P M de Luxe	36.09	
			1/2 Cs Hill & Hill	21.77	
			1/2 Cs Fitzgerald	18.96	
			1/2 Cs J. Baret Brandy	19.62	171.58
	2/ 9/44	21091	1 Cs Olympic Brand Filets of Anchovies	40.32*	40.32
(b)	2/26/44	41728	1/2 Cs Lord Calvert	18.22	
			1 Cs Olives Pur Sun	14.15*	
			1/2 Cs Anis Gorila	16.29	
			1/2 Cs Fernet Branca	13.75*	
			1/2 Cs Passionola Red	5.10*	67.51
(c)	7/28/44	47596	1/2 Cs Calvert Spec.	16.52	
			1 Cs Ravet Brandy	39.23*	55.75
	6/21/44	46053	1/2 Cs Calv. Lord	21.35	
			1/2 Cs Old Fitz	18.97	
			1 Cs Marin Rum Gold	37.57*	77.89
	5/25/44	45155	1/2 Cs Calv. Reserve	23.15	
			1/2 Cs Old Fitz	23.87	
			1/2 Cs Nautical Rum	21.27*	
			1/2 Cs Hermosa Tequila	21.66*	89.95
	3/ 8/44	42162	1/2 Cs Calv. Spec.	13.40	
			1/2 Cs Old Fitz	15.37	
			1 Cs Marin Rum Gold	29.76*	58.53
(d)	7/19/44	47033	3 Cs Luis Caballero	129.15	
			1 Cs Fitzgerald	37.93	
			5/12 Cs Walkers de Luxe (OO)	13.61	
			5/12 Cs Melwood	13.46	
			1/4 Cs Canadian Club	12.29	
			1/2 Cs Walkers de Luxe (86)	15.69	
			1 Cs Don Q Rum White	39.11*	
			1 Cs Marin Rum Gold	37.57*	
			1/4 Cs Bardinet Cor. de Cocoa	9.45	
			1/4 Cs. Sloe Gin Bardinet	10.06*	318.32
	5/27/44	45299	1 Cs Fitzgerald	37.93	
			1 Cs Three Feathers	40.23	
			1 Cs Banet Brandy	39.23*	
			1 Cs Marin Rum Heavy	37.58	154.97



Pur-chaser	Date	Inv. No.	Item	Item Price	Inv.Total
	6/29/44	46336	1 Cs Fitzgerald	\$ 37.93	
			1 Cs Baret Brandy	39.23	
			1/2 Cs Black & White	26.27	
			1/2 Cs Three Feathers	20.12	
			3 Cs Marin Rum Gold	112.71*	
			1/4 Cs Red Horse Sloe Gin	8.44*	244.70
	6/14/44	54830	5 Cs Anis Gorilla	169.75*	
			2 Cs Fitzgerald	75.86	
			1 Cs Walkers de Luxe	31.38	
			1 Cs J. Baret Brandy	39.23	316.22
	6/27/44	46277	10 Cs Fitzgerald	379.30	
			12 Cs Hermosa Tequila	501.48*	
			3 Cs Anis Gorilla	101.85*	982.63
(e)	6/23/44	46146	1 Cs Olympic Anchovies	31.75*	
			1/2 Cs Red Horse Slo Gin	16.88*	
			2 Cs Barardi Rum		
			Ambar Gold	77.54*	
			2 Cs Barardi Rum		
			Silver White	77.54*	
			1/2 Cs Havana Club Gold	24.36*	
			1/2 Cs Baret Brandy	19.62*	
			1/2 Cs Fitzgerald	18.97	266.66

Dated: December 5th, 1944.

GEORGE A. FARADAY

W. H. BRUNNER

Attorneys for Plaintiff

State of California

City and County of San Francisco—ss.

W. H. Brunner, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff Price Administrator in the within entitled action and as such makes this verification in behalf of said Price Administrator. That the facts alleged in these answers to interrogatories have been developed by investigators of the Office of Price

Administration, and affiant is informed and believes, and alleges upon such information and belief, that they and each of them are true.

W. H. BRUNNER

Subscribed and sworn to before me this 7th day of December, 1944.

[Seal] NELL O'DAY

Notary Public in and for the City and County of San Francisco, State of California

My Commission Expires March 26, 1948.

Receipt of a copy of the within plaintiff's Answers to Interrogatories is hereby admitted this 8th day of December, 1944.

THOMAS, BEEDY, NELSON &  
KING

Attorneys for Defendant

[Endorsed]: Filed Dec. 8, 1944. [12]

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[Title of District Court and Cause.]

### ORDER THAT INJUNCTION ISSUE

In this action plaintiff, Administrator of the Office of Price Administration, seeks an injunction, pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended against defendant, a wholesale drug and liquor concern. Specifically, plaintiff contends that defendant violated the provisions of Maximum Price Regulation No. 445, as amended and revised, which establishes maximum prices for distilled spirits and

wines, in that defendant sold whisky to certain purchasers only upon the condition that said purchasers also buy, in addition to the whisky, other commodities which defendant then had for sale. There is no question of any violation of price ceilings as to the individual commodities; the charge is that the total price received by the defendant for the whisky plus the unwanted [13] commodity, exceeded the maximum price established by the Regulation for the whiskey. The controlling section of the Regulation is Section 7.8 (b) (Amendment 15, effective May 8, 1944), which reads as follows:

“(b) Evasion. The provisions of this regulation shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt, of or relating to any commodity, or service covered by this regulation, alone or in conjunction with any other commodity or service or by way of finder's fees, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement, combination sales, or trade understanding; by any change in style or manner of packing; by requiring the buyer to purchase packaged distilled spirits or wine on a per drink basis; or in any other way. The specific enumeration of acts constituting evasion is illustrative but not exclusive.”

The Court finds, from the evidence, that the defendant has violated the Regulation and specifically by tying agreements and combination sales



prohibited in said Section 7.8 (b). The facts justify the restraint prayed for. Accordingly, it is hereby

Ordered that defendant, its agents, servants, employees, attorneys, and all persons in active concert or participation with the defendant, be and the same are hereby Enjoined from

Directly or indirectly selling or delivering imported whiskey or domestic whiskey to purchasers who ordered the same and whose orders are accepted by defendant only on condition that such purchaser accept delivery also of and pay for imported or domestic rum, gin, tequila, vodka, or other beverages, including wines, or any other commodity; and from directly or indirectly selling or delivering imported whiskey or domestic whiskey, or other distilled spirits and wines, at prices [14] in excess of the Maximum Price Regulation No. 445, as amended or revised, or as hereafter amended or revised, or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

It is therefore Ordered that judgment be entered herein in favor of plaintiff, as prayed, on findings of fact and conclusions of law, the respective parties to pay their own costs.

Dated: April 19, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Apr. 19, 1945. [15]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the above entitled Court, sitting without a jury, Honorable Michael J. Roche, judge presiding, W. H. Brunner and Richard Coblentz, by Richard Coblentz, Esquire, appearing for plaintiff, and Thomas, Beedy, Nelson & King, by Louis S. Beedy and John B. King, Esquires, appearing for defendant, and said action having been tried on the 1st day of March, 1945, and evidence both oral and documentary having been introduced, and said action having been submitted for decision, the Court, being fully advised now makes its findings of fact as follows: [16]

### FINDINGS OF FACT

#### I.

Each and all of the allegations contained in Paragraph I, of the Complaint for Injunction on file in the above entitled action are true.

#### II.

Each and all of the allegations contained in Paragraph II, of said Complaint are true.

#### III.

Each and all of the allegations contained in Paragraph III, of said Complaint are true.

## IV.

Each and all of the allegations contained in Paragraph IV, of said Complaint are true.

## V.

Each and all of the allegations contained in Paragraph V, of said Complaint are true.

## CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds that:

## I.

Plaintiff is entitled to judgment that defendant, its agents, servants, employees, attorneys, and all persons in active concert or participation with the defendant be, and the same are hereby, enjoined from

Directly or indirectly selling or delivering imported whiskey or domestic whiskey to purchasers who ordered the same and whose orders are accepted by defendant only on condition that such purchaser accept delivery also of and pay for imported or domestic rum, gin, tequila, vodka, or other beverages, including [17] wines, or any other commodity; and from directly or indirectly selling or delivering imported whiskey or domestic whiskey, or other distilled spirits and wines, at prices in excess of the Maximum Price Regulation No. 445, as amended or revised, or as hereafter amended or revised, or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

Judgment is hereby ordered to be entered accordingly.

Dated at San Francisco, California, this 10th day of May, 1945.

MICHAEL J. ROCHE

United States District Judge

Approved as to form, as provided in Rule 5 (d)

THOMAS, BEEDY, NELSON &  
KING

By.....

Attorneys for Defendant

Not approved as to form, as provided in Rule 5 (d) of the Rules of Practice of the above entitled Court, for the reason that the foregoing proposed findings of fact are not stated specially as required by Section 52 (a) of the Federal Rules of Civil Procedure.

THOMAS, BEEDY, NELSON &  
KING,

By LOUIS S. BEEDY

Attorneys for Defendant.

[Endorsed]: Lodged May 4, 1945. Filed May 10, 1945. [18]



In the District Court of the United States, Northern District of California, Southern Division

No. 23628-R

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

COFFIN-REDINGTON & CO., a Corporation, 311 Folsom Street, San Francisco, California,  
Defendant.

### JUDGMENT FOR PERMANENT INJUNCTION

The above entitled action came on regularly for trial in the above entitled Court, sitting without a jury, Honorable Michael J. Roche, judge presiding, W. H. Brunner and Richard Coblentz, by Richard Coblentz, Esquire, appearing for plaintiff, and Thomas, Beedy, Nelson & King, by Louis S. Beedy and John B. King, Esquires, appearing for defendant, and said action having been tried on the 1st day of March, 1945, and evidence both oral and documentary having been introduced and said action having been submitted for decision, and written Findings of Fact and Conclusions of Law, having heretofore been filed, and the Court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed that:

Defendant its agents, servants, employees, attor-

neys [19] and all persons in active concert and participation with the defendant be, and they are hereby, enjoined from

Directly or indirectly selling or delivering imported whiskey or domestic whiskey to purchasers who ordered the same and whose orders are accepted by defendant only on condition that such purchaser accept delivery also of and pay for imported or domestic rum, gin, tequila, vodka, or other beverages, including wines, or any other commodity; and from directly or indirectly selling or delivering imported whiskey or domestic whiskey, or other distilled spirits and wines, at prices in excess of the Maximum Price Regulation No. 445, as amended or revised, or as hereafter amended or revised, or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

Dated at San Francisco, California, this 10th day of May, 1945.

MICHAEL J. ROCHE,

United States District Judge.

Approved as to form, as provided in Rule 5(d).

THOMAS, BEEDY, NELSON &  
KING,

By: LOUIS S. BEEDY,

Attorneys for Defendant.

[Endorsed]: Filed May 10, 1945. [20]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Coffin-Redington & Co., a corporation, the defendant above named, hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the final judgment entered in this action on May 10, 1945.

THOMAS, BEEDY, NELSON &  
KING,

Attorneys for Defendant.

Of Counsel:

LOUIS S. BEEDY,  
JOHN BENNETT KING.

[Endorsed]: Filed July 12, 1945. [21]

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[Title of District Court and Cause.]

### ORDER EXTENDING TIME

Good Cause Appearing Therefor, it is hereby Ordered that the defendant above named may have to and including the 29th day of September, 1945, in which to file the Record on Appeal with the Circuit Court of Appeals for the Ninth Circuit.

Dated: August 17th, 1945.

ST. SURE,

Judge of the United States  
District Court.

Approved Aug. 17, 1945.

HERBERT H. BENT,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 17, 1945. [22]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Defendant above named hereby designates the portions of the record, proceedings and evidence which it desires included in the Record on Appeal:

1. Complaint for Injunction;
2. Answer of Defendant,
3. Interrogatories;
4. Answers to Interrogatories;
5. Reporter's Transcript;
6. All evidence introduced at the trial;
7. Findings of Fact and Conclusions of Law;
8. Order that Injunction Issue;
9. Judgment for Permanent Injunction;
10. Notice of Appeal;
11. Order Extending Time to File Record on Appeal with Circuit Court of Appeals;
12. Stipulation as to Reporter's Transcript;
13. Statement of Points upon Which Defendant will Reply Upon Appeal;
14. Designation of Contents of Record on Appeal.



Dated at San Francisco, California, this 29th day of August, 1945.

THOMAS, BEEDY, NELSON &  
KING,

Attorneys for Defendant.

Receipt of a copy of the foregoing is hereby admitted this 29th day of August, 1945.

HERBERT H. BENT,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 30, 1945. [24]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
DEFENDANT WILL RELY UPON APPEAL

Defendant proposes, upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to rely upon the following points as error:

I.

There was insufficient evidence to support the finding of the trial court that the allegations contained in paragraph I of the Complaint for Injunction were true.

II.

There was insufficient evidence to support the finding [25] of the trial court that the allegations contained in paragraph IV of the Complaint for Injunction were true.

III.

There was insufficient evidence to support the finding of the trial court that the allegations con-

tained in paragraph V of the Complaint for Injunction were true.

#### IV.

The trial court erred in concluding as a matter of law that plaintiff was entitled to judgment that defendant, its agents, servants, employees, attorneys, and all persons in active concert or participation with defendant should be enjoined from directly or indirectly selling or delivering imported whiskey or domestic whiskey to purchasers who ordered the same and whose orders were accepted by defendant only on condition that such purchaser accept delivery also of and pay for imported or domestic rum, gin, tequila, vodka, or other beverages, including wines, or any other commodity; and from directly or indirectly selling or delivering imported whiskey or domestic whiskey, or other distilled spirits and wines, at prices in excess of the Maximum Price Regulation No. 445, as amended or revised, or as hereafter amended or revised, or otherwise violating said Regulation, or attempting or agreeing to do anything in violation thereof.

THOMAS, BEEDY, NELSON &  
KING,

Attorneys for Defendant.

Receipt of a copy of the foregoing is hereby admitted this 28th day of August, 1945.

HERBERT H. BENT,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 30, 1945. [26]

[Title of District Court and Cause.]

STIPULATION AS TO REPORTER'S  
TRANSCRIPT

It is hereby stipulated, in accordance with Rule 21 of General Rules of Practice of the above-entitled Court, that only one copy of the Reporter's Transcript need be filed.

Dated at San Francisco, California, this 29th day of August, 1945.

HERBERT H. BENT,  
Attorney for Plaintiff.

THOMAS, BEEDY, NELSON &  
KING,  
Attorneys for Defendant.

[Endorsed]: Filed Aug. 30, 1945. [27]

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District Court of the United States, Northern  
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 27 pages, numbered from 1 to 27, inclusive, contain a proceedings in the case of Chester Bowles, Administrator, Plaintiff, vs. Coffin-Redington & Co., De-

fendant, No. 23268-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of September, A.D. 1945.

[Seal]

C. W. CALBREATH,  
Clerk.

M. E. BUREN,  
Deputy Clerk. [28]



In the Southern Division of the United States District Court, in and for the Northern District of California

Before: Hon. Michael J. Roche, Judge.

No. 23628-R

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

COFFIN-REDINGTON & CO., a Corporation, 311  
Folsom Street, San Francisco, California,  
Defendant.

Thursday, March 1, 1945

Counsel Appearing:

For Plaintiff: Richard Coblentz, Esq.

For Defendant: Louis S. Beedy, Esq., John B.  
King, Esq.

The Clerk: Bowles v. Coffin-Redington.

Mr. Coblentz: Ready.

Mr. Beedy: Ready.

Mr. Coblentz: If your Honor please, this is an action for an injunction. It is the first of a series of cases which involves not a violation of a ceiling price of a particular item, but a tie-in sale of liquor, for example if the ceiling price [1\*] of whisky is \$5 and the ceiling price of gin, for example, was \$5,

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\*Page numbering appearing at top of page of original Reporter's Transcript.

and the ceiling price of whisky is \$5, and a person asks for whisky alone and is refused, and he is given whisky and gin for \$10, the sum of the two ceiling prices, it is our position that that is requiring him to pay \$10 for the whisky, which is over the \$5 ceiling.

The Court: Was all of the liquor within the ceiling, each separate item?

Mr. Coblentz: I don't want to be tied down that it was in this case, but for the purpose of this case I will make the stipulation that each item, itself, was within the ceiling. Is that satisfactory?

Mr. Beedy: That is the fact.

Mr. Coblentz: For the purpose of this case we will so stipulate.

The Court: Is there any question about it?

Mr. Coblentz: I think there were one or two items, but we are not concerned with that.

The Court: Before we go any further, what is the matter now before the Court, and what is the question for final decision?

Mr. Coblentz: As to whether or not the defendant refused to sell items of liquor at the ceiling price but required that they purchase other items that they did not want and paid for them, so that the amount paid is greater than the ceiling for [2] the item which was desired.

The Court: In violation of the regulations?

Mr. Coblentz: In violation of the regulations.

The Court: All right, read the regulations as to the violation.

Mr. Coblentz: Here is one with all of the amend-

ments attached to it, and that is section 5.3, and section 5.4, subdivision (b).

Mr. Beedy: You mean section 7.4(a), subdivision (b)?

Mr. Coblentz: Well, that may also be involved, but the matter of figuring the ceiling price for wholesalers is provided for in section 5.4.

The Court: Read it.

Mr. Coblentz: "A wholesaler's initial maximum price per case to retailers shall be his net cost per case (figured according to section 5.3), for his latest base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, multiplied by the percentage mark-up for the item being priced, as follows."

Does your Honor want the rest of it?

The Court: I want to get your thought, keeping in mind the issue we have involved and the relation to our problem.

Mr. Coblentz: One of the items, we will show, has a [3] ceiling of \$5, and a customer wanted to buy that for \$5, and the defendant refuses to make the sale——

The Court: Is there any legal obligation for him to sell it?

Mr. Coblentz: No. However, the defendant proceeds to say that if you will buy gin for \$5 we will then supply you with the whisky you want for \$5. The customer does not want the gin but he wants the whisky so badly that he buys the two items,

thereby paying \$10 for the whisky and for an item that he does not want.

The Court: The ceiling is \$5 and he is willing to do that, what are we going to do about it?

Mr. Coblentz: I think we ought to enjoin that.

The Court: Where is the law that justifies us in doing it, if it is true that the gin is sold at ceiling and the whiskey sold at ceiling? Is that true?

Mr. Coblentz: That is true.

The Court: I will give you a record on it. Proceed. You are asking for an injunction?

Mr. Coblentz: That is correct.

The Court: Proceed.

Mr. Coblentz: I will call Mrs. Parker.

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MATTIE R. PARKER,

called as a witness by the Plaintiff; sworn.

The Clerk: Will you state your name to the Court, please? [4]

A. Mattie R. Parker.

Mr. Coblentz: Q. Mrs. Parker, are you the owner and manager of a pharmacy in Berkeley known as the West Berkeley Pharmacy?

A. I am.

Q. At 1523 San Pablo Avenue? A. Yes.

Q. Do you handle, do you sell at retail liquor?

A. I do.

Q. For how long have you been doing that?

A. About 8½ years.



(Testimony of Mattie R. Parker.)

Q. Have you in the past year purchased any liquor from Coffin-Redington? A. I have.

Q. Did you receive liquor during that time which you did not order?

A. Well, I received anything that I could get, all of the goods that were allocated—I took what I could get without question.

Q. I will show you some invoices which I will identify as we go along, of Coffin-Redington. One is dated, the date of the order is July 25; the date of the invoice is July 28. It invoices you for one-half case of Calvert Special and one case of Ravert Brandy. Did you order the brandy on that invoice?

A. Well, I did not order every one. All of that stuff was allocated at that time.

Q. Did you want either of them?

A. Yes, I wanted the brandy.

Q. You wanted the brandy and also the whisky?

A. Yes.

Q. There is an invoice of June 21 for half a case of Calvert Lord,  $\frac{1}{2}$  case Old Fitz, and a case of Marin Rum Gold. Did you want all of those?

A. Well, I did not refuse any of them. [5]

Q. Did you order any of them?

A. I did not order them, I took what was allocated to me.

Q. Did you want the rum?

A. I did not refuse any of it. Naturally, whisky being the biggest seller, and they being out of whisky, I did not refuse any of it.

(Testimony of Mattie R. Parker.)

Q. Here is one of May 25, 1/2 case Calvert Reserve, 1/2 case Old Fitz, 1/2 case Nautical Rum, 1/2 case Hermosa Tequila. A. Yes.

Q. Did you order those items?

A. No, I took whatever I could get, whatever I was allocated.

Q. Did you want each of them?

A. Well, I wanted to get anything I could get, but, as I said before, I preferred to have whisky.

Q. Here is one of March 2, for 1/2 case of Calvert Special, 1/2 case Old Fitz and 1 case Marin Rum Gold. Did you order any of those?

A. No, I took whatever I could get.

Q. Do you have any of those items left now from this invoice?

A. I might have, I don't know, but I have ordered others since then.

Q. Of Tequila? A. Yes.

Q. You ordered that?

A. I have ordered Tequila since then.

Q. Do you remember a visit from an investigator of the Office of Price Administration in August, last year? A. Yes.

Q. Do you remember his name?

A. No, I do not.

Q. Would you recognize it as Frank Richardson?

A. I think I [6] remember hearing that name.

Q. Do you remember making a written statement for him?

(Testimony of Mattie R. Parker.)

A. I remember he wrote out something and asked me to sign it and wanted my inventory.

Q. You mean inventory, or invoices?

A. Invoices.

Q. You read that over and signed it?

A. I read that over and signed it. He insisted on my doing it and I did not refuse.

Q. Do you recall that that statement said that in the purchases of my merchandise for this store I many times took merchandise that I did not order or want. I just took what they sent me in order to get my allotment of whisky. In several instances merchandise was sent me that I would not have ordered, such as rum and gin.

Mr. Beedy: If your Honor please, that is cross-examination of his witness.

Mr. Coblantz: It is, certainly. It is obvious that this witness has been reached.

The Court: Just what do you mean by that, "has been reached?"

Mr. Coblantz: I mean that the defendant has through its agents or in some manner approached these witnesses and told them, "Now you are in business, and if you ever expect to get any more whisky from us or from anyone else you will have to change your testimony, and you will have to state that the Government Agents came to you and told you if you did not sign you will [7] get into a lot of trouble with the Government," and they demanded in this case, as the record will show, answers to interrogatories saying who the witnesses would be, showing what

(Testimony of Mattie R. Parker.)

sales had been made, and thereafter they caused to be published in the "Chronicle" in a very prominent place,—I do not mean that they influenced the "Chronicle," but they got it to their attention in such a way as to have it published, so that not only this defendant would not supply them, but none of the others in the wholesale business would if they did testify.

The Court: You have made a statement. Do you intend to prove that?

Mr. Coblentz: Yes, I will, by the testimony that we will put on here this morning.

The Court: Proceed and prove it.

Mr. Coblentz: Q. The question is, do you recall having made that statement?

A. I do not recall exactly making that statement, no.

Q. Well, if I show it to you——

A. (Interrupting) But I signed what he wrote down; you know, in the store I am busy, I am there alone, I have two, three, four or five or six people in the store at all times, and whenever a salesman comes in, or in this case where the OPA man came in, like that, I take a minute to wait on a customer, and I could not concentrate and give him my full thought about that. He wrote out something and asked me to sign it. I hurriedly glanced through it, and [8] I thought I must sign it, there is nothing in there that is harmful in any way to me, or anyone else, and I signed it, and then proceeded to forget about it.



(Testimony of Mattie R. Parker.)

Mr. Coblentz: I think that is all from this witness.

Mr. Beedy: I thought he was going to prove that Mrs. Parker was reached.

The Court: We will have to get through with the witness. Proceed.

### Cross Examination

Mr. Beedy: Q. Mrs. Parker, how long have you been buying liquors from Coffin-Redington-

A. For sometime; it was 8½ years last August.

Q. And has Mr. Duffy, their salesman, been calling on you for liquor orders since about August of 1944?

A. Yes.

Q. You do a drug business, as well as a liquor business?

A. Yes.

Q. It had been the practice to send you orders of drugs and liquors that they thought that you wanted, prior to that time, isn't that so?

A. Yes.

Q. And you knew, did you not, that if any item was sent to you, whether drugs or liquor, you had the privilege of returning it if you did not want it?

A. Surely.

Q. And from time to time you did return items of liquor and drugs that you did not want, isn't that so?

The Court: What is your answer? The reporter must get down your answer.

A. Yes. [9]

Mr. Beedy: Q. Now, it is a fact, is it not, Mrs.

(Testimony of Mattie R. Parker.)

Parker, that in 1942 and later than that whisky became very scarce; isn't that so?

A. That is right.

Q. And if you wanted to continue in the liquor business you had to get some other type of alcoholic beverage to sell to your customers. Isn't that so?

A. That is right.

Q. And isn't that the reason that you bought rum and Tequila and brandy and these other items that are spoken of? A. Yes.

Q. You bought them many times after the orders that counsel has referred you to, isn't that so?

A. Yes.

Mr. Beedy: That is all, Mrs. Parker.

### Redirect Examination

Mr. Coblantz: Q. I will ask you, Mrs. Parker, when was the last time that Mr. Duffy called on you?

A. Two weeks ago.

Q. And prior to that?

A. He called on me every two weeks.

Q. Weren't some of these orders made over the telephone? A. What do you mean?

Q. The orders that you gave to Coffin-Redington.

A. Oh, yes, I called on them every time I had orders in the meantime.

Q. Then they sent you some without any orders?

A. Well, they sent me all that list that is on the allocation list, they sent it out whenever it came in.

(Testimony of Mattie R. Parker.)

Q. If that is the case, what did Mr. Duffy call on you for?

A. Why does any salesman call a place of business for?

Q. I am asking you the question.

A. Well, that is what a salesman [10] is for, to call on a house every so often and keep in contact with the house, and present their new goods.

Q. When was the last time that you returned any liquor to Coffin-Redington?

A. I have not returned any liquor, I do not think I returned any liquor, as I was keeping all I could get.

Mr. Coblentz: That is all.

Mr. Beedy: That is all.

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A. FERRONI,

called as a witness by plaintiff, sworn.

The Clerk: Q. Will you state your name to the Court? What is your name?

A. A. Ferroni.

Direct Examinatoin

Mr. Coblentz: Q. Mr. Ferroni, you run a restaurant in San Francisco called the Transport Cafe, located at 1901 Union Street, San Francisco?

A. Yes.

Q. How long have you been in business?

A. About fourteen years.

(Testimony of A. Ferroni.)

Q. You have been previously an owner?

A. I was part owner once, for one year.

Q. When was that?

A. In 1940, I think.

Q. Do you recall making purchases within the last year from Coffin-Redington, of liquor?

A. Yes, I did business with Coffin-Redington.

Q. When you ordered you did order some whisky from them?      A. Sure. [11]

Q. Were you told at that time that you could not have any whisky without buying other liquor?

A. No.

Q. How did you make your purchases?

A. What do you mean?

Q. Did you order them over the telephone, or did you have a salesman come in?

A. No, they came over every couple of weeks, they passed by and I ordered some more stuff every two weeks.

Q. Who was it that would come in?

A. Levy.

Q. A man by the name of Levy?      A. Yes.

Q. Didn't he tell you in June of last year that if you wanted to make a deal he would let you have 10 cases of Fitzgerald Whisky if you took 12 cases of Hermosa Tequila and 3 cases of Anis Gorilla?

A. He didn't tell me that. I say I would like to have 10 cases of whisky, and we talked and talked, and he asked me if I wanted a dozen cases of Tequila, and 2 or 3 cases of the Anis Gorilla.



(Testimony of A. Ferroni.)

Q. Haven't you any recollection of what he made you take?

Mr. Beedy: I object to that as there is no foundation laid that he made him take anything that he did not want. I ask that that go out.

The Court: It may go out.

A. What he says, "Do you want to take any Anis Gorilla, about two or three cases." I say I will buy that, and when he talk about Tequilla, I buy that. I will tell you, they don't force me to buy anything.

Mr. Coblentz: I will ask that the last statement go out [12] as the conclusion of the witness.

The Court: I will allow it to stay in. Develop what the facts are.

Mr. Coblentz: Q. Do you recall having been visited by an investigator of the Office of Price Administration in August of last year? A. Yes.

Q. Do you recall what conversation you had with him?

A. Well, in the conversation he told me they forced me to buy the Tequila, one thing or another, otherwise I don't get the whisky, but they never forced me to buy Tequila, because otherwise they don't give me any whisky.

Q. Was that your entire conversation with him?

A. That is all.

Q. Do you recall having signed this statement?

A. Well, he wanted me to sign, and he says, "There is no harm to sign." I didn't want to sign because it is a fact that they never forced me to buy

(Testimony of A. Ferroni.)

something I did not need; for the last three years I didn't do that at any time.

Q. Do you recall the name of this investigator?

A. Well, I know it is that fellow, there, I don't remember his name.

Q. Is this the gentleman that you refer to?

A. Yes.

Q. That is Mr. Richardson?

A. Yes. He told me that he was from the Government and he wanted me to sign this statement, and I didn't want to sign, that didn't mean nothing to me, and I said I didn't want to cause them any trouble because they treat me nice. [13]

Q. I show you an invoice.

Mr. Beedy: Which one is that?

Mr. Coblentz: Invoice of July 11th. Do you recall receiving these items? A. Yes.

Q. There are three cases of Louis Caballero. What is that? A. That is brandy.

Q. I case Fitzgerald. That is whisky?

A. That is whisky.

Q. 5/12 of a case of Walker's de luxe. That is also whisky? A. Yes.

Q. 5/12 of a case of Melwood. What is that?

A. That is whisky, too.

Q.  $\frac{1}{4}$  case of Canadian Club,  $\frac{1}{2}$  case Walker's de luxe, 1 case Don Q. Rum White, 1 case Marin Rum Gold,  $\frac{1}{4}$  case Bardinet Cor. de Cocoa,  $\frac{1}{4}$  case Sloe Gin Bardinet. Did you use that Sloe Gin Bardinet in your coffee royals?

A. No, you can't use that in coffee royals.

(Testimony of A. Ferroni.)

Q. This is the invoice of May 27. That shows one case of Fitzgerald, one case of Three Feathers, one case of Banet Brandy, one case of Marin Rum Heavy. Did you order that rum?

A. That shows the stuff I order.

Q. I am going back to the invoice of July. Did you order that Don Q Rum White? A. Yes.

Q. And the Marin Rum Gold?

A. Yes, I ordered it.

Q. Now, here is one of June 29, 1 case of Fitzgerald, 1 case of Baret Brandy,  $\frac{1}{2}$  case of Black and White,  $\frac{1}{2}$  case Three [14] Feathers, 3 cases of Marin Rum Gold, and  $\frac{1}{4}$  case of Red Horse Sloe Gin. Did you order that rum and that gin? A. Yes.

Q. And on June 14, five cases of Anis Gorilla?

A. Yes.

Q. You used that in coffee royals?

A. I used it in coffee royals.

Q. 2 cases of Fitzgerald, 1 case of Walker's de luxe, and 1 case of J. Baret Brandy. A. Yes.

Q. And on June 27, 10 cases of Fitzgerald, 12 cases of Hermosa Tequila, and 3 cases of Anis Gorilla. That is on June 27th you ordered 3 cases of Anis Gorilla and then 5 more on June 14?

A. Yes.

Q. So that in thirteen days, a little less than two weeks, you used up 5 cases of Anis Gorilla, a drop at a time, in coffee royals?

Mr. Beedy: I object to that. He has not said that he used up 5 cases or 8 cases. He said he bought them. We are talking about his purchases of them.

(Testimony of A. Ferroni.)

The Court: How many drops do they put in a coffee royal?

Mr. Coblentz: Mr. Ferroni told me they put in one drop.

Q. Didn't you tell me yesterday that you used one drop in coffee royals? A. More than one drop.

Q. Two drops? A. Yes.

Mr. Coblentz: That is all.

### Cross Examination

Mr. Beedy: Q. Mr. Ferroni, how long have you been purchasing [15] liquor from Coffin-Redington?

A. About two years, something like that.

Q. Who is the salesman that calls on you from Coffin-Redington Company? A. Levy.

Q. Mr. Morris Levy? A. Yes.

Q. How often does he call?

A. Every two weeks.

Q. Now, you signed all of those orders that Mr. Coblentz has shown you, didn't you? A. Yes.

Q. Isn't it a fact, Mr. Ferroni, that if you did not want any of the articles that were on those orders you could have told Mr. Levy so and he would take it off? Isn't that right?

A. Tell me that again.

Q. Strike out that question and I will ask another.

Do you remember buying on June 29, 1944, Mr. Ferroni—that is one of the orders that Mr. Coblentz just showed you—3 cases of Marin Rum Gold?

A. Yes.



(Testimony of A. Ferroni.)

Q. Do you remember that next day you called up Coffin-Redington Company and Mr. Levy and said to him that you did not want 3 cases, all you wanted was 2 cases?

A. No, I never called up.

Q. You never did? Did you call up and tell him instead of three cases you wanted two cases, and to take off one case?

A. I don't remember.

Q. You don't remember?

A. I don't remember. I don't think I called up.

Q. Your recollection is, then, that you received all of these [16] items and used them in your business, is that it?

A. Yes.

Q. Now, it is a fact, is it not, Mr. Ferroni, that you do have a large business in coffee royals?

A. Yes.

Q. What is a coffee royal? Isn't that coffee to which has been added liquor of some kind?

A. Coffee with whisky, rum, brandy or anything you like.

Q. Whisky, rum or brandy? A. Yes.

Q. A liqueur? A. Yes.

Q. And some Anisette and things of that kind?

A. Yes.

Q. And you have a large sale of coffee royals in your neighborhood? A. Yes.

Q. Whisky became scarce, didn't it, Mr. Ferroni, along in the latter part of 1942 and '43—whisky was getting harder to get, isn't that so?

A. Yes.

(Testimony of A. Ferroni.)

Q. And if you are going to stay in the liquor business isn't it a fact that you had to get some kind of alcoholic beverage as a substitute for whisky if you were going to keep your customers?

A. Well, maybe whisky and all that stuff got pretty scarce, but sometimes I have forty or fifty people come over there in one night and they don't buy anything only take a coffee royal.

Q. In other words, you have forty or fifty customers every evening that come in there for coffee royals? A. Yes.

Q. You add whisky, if you have it, or brandy, or tequila, or anything you have? A. Yes. [17]

Q. You have plenty of storage space out there, don't you, where you can keep all of these things until the time comes when you want to use them in the course of your business, isn't that right?

A. Yes.

Q. It is a fact, is it not, Mr. Ferroni, that you were often sold whisky alone without any other items?

Mr. Coblentz: If your Honor please, I think that question should be more specific as to time.

The Court: Fix the time.

Mr. Beedy: Well, around the middle of 1944, the time we are concerned with in this case, he came to see you as a salesman, you wanted only whisky and he took your order for whisky without rum or brandy or anything else, isn't that so?

A. Different times I give orders for just whisky.

Q. Just to refresh your recollection, I am

(Testimony of A. Ferroni.)

showing him, Mr. Coblentz, an order dated August 9, 1944, in which Mr. Ferroni bought 15 cases of Three Feathers, and there are no other items on it. I show you an order, Mr. Ferroni, that is your signature, is it not?

A. Yes, I bought this on the 9th of August.

Q. That is the invoice, they sold you 15 cases of Three Feathers? A. Yes.

Q. Three Feathers only?

A. Nothing else, just the whisky.

Q. Isn't it a fact that there were other occasions that they sold you only whisky when whisky was the only thing you wanted? A. Yes. [18]

Q. Of course, you know, and he told you that whisky was allocated, they did not have whisky to meet the entire demand, they had to allocate it amongst customers, isn't that so? A. Yes.

Q. And there were times when he let you have nothing but whisky, isn't that so? A. Yes.

Q. All you wanted of it? A. Yes.

Mr. Beedy: That is all, your Honor.

### Redirect Examination

Mr. Coblentz: Q. Mr. Ferroni, do you recall the date of the visit of the OPA investigator to your place? Do you remember the date?

A. I don't remember, it is many months ago, but I don't remember the date.

Q. Do you recall that after Mr. Levy visited you—— A. I never told him that.

Q. Do you recall giving the order that appears

(Testimony of A. Ferroni.)

on this invoice that Mr. Beedy just showed you?  
Do you remember ordering this?

A. 15 cases of Three Feathers, yes.

Q. It shows the date of the order as August 8th. Is that the date that you ordered it?

A. No, that is the invoice.

Q. The invoice is dated August 9th. Did you order that on August 8th?

A. He came to my place but I don't remember the exact date.

Q. That is correct, as far as you remember?

A. Yes.

Mr. Coblentz: We offer that in evidence.

Mr. Beedy: No objection. [19]

The Court: It may be admitted and marked.

(The invoice of August 9th was marked  
Plaintiff's Exhibit 1.)



(Testimony of A. Ferroni.)

## PLAINTIFF'S EXHIBIT No. 1

COFFIN-REDINGTON CO.

Wholesale Liquor Merchants

311 Folsom St.

[Stamp] : H.C.D.

Oakland San Francisco Reno, Nev.

Phone Douglas 2952

Salesman : M. Levy Date Ordered 8/8/44 Register Number 48062

Invoice Date Aug. 9, 1944 Terms 15 Days

Transport Cafe

1901 Union Street

San Francisco, Calif.

[Circled L marked opposite] : Stamps 20c

Checker Written By Credit Approx-

Shipped Via Ship When

[Stamped] : W.R.A.

[Circled in Pencil] : 31

Office Use Only Sect. Clerk 1

[Circled X mark—O✓ in red pencil]

Quan.	Unit	Customer's Order No.	Size	Price	Disc.	539.55*	Code
15	Cases	Three Feathers 3597*	55	4023	Net	603.45	9
		Wine Gals.	36.00			603.45	
						539.55*	

Wine Gals. 36.00

603.45

539.55\*

A. Ferroni Nu

State License No. P-3264-G

We guarantee that the articles of wines, liquors, food, and drugs mentioned herein are not adulterated or misbranded within the meaning of the Federal Food and Drug Act, June 30, 1906, as amended and the California Pure Food and Drug Act, March 11, 1907, while contained in original unbroken packages.—Coffin-Redington Co.

\* Figures in red.

MRS. EDITH GELSI,

called as a witness by plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. I am Edith Gelsi.

Mr. Coblentz: Q. Mrs. Gelsi, you operate a tavern in Daly City? A. Correct.

Q. What is the name of your tavern?

A. Gelsi's Tavern.

Q. That is 6278 Mission Street?

A. Correct.

Q. How long have you been operating?

A. It will be nine years this coming July.

The Court: Is it run in your name?

A. Under my own name.

Mr. Coblentz: Your husband helps you manage it?

A. In the evening.

Q. He speaks Italian and a little broken English, is that correct? A. Yes.

Q. But you are the owner?

A. I am the owner.

Q. Do you recall purchasing liquor from Coffin-Redington in June of last year?

A. In the early part of June, yes.

Q. Do you remember the name of the man who called on you? Did a man call on you?

A. Yes, he calls on me every two weeks? [20] his name is Mr. Guito.

Q. Is he the gentleman that called on you in June last year? A. Yes, Mr. Guito.

(Testimony of Mrs. Edith Gelsi.)

Q. That is the occasion when you bought some anchovies?      A. Correct.

Mr. Beedy: I object to going into the question of anchovies because it is outside of the issues made by the complaint.

Mr. Coblantz: Your Honor, in this case the complaint alleges that they were required to buy other items than alcoholic beverages in order to get whisky. I am merely identifying the particular occasion.

Mr. Beedy: The purpose of that is to fix the time, is that it?

Mr. Coblantz: Yes.

Q. Will you tell the Court in your own language, as well as you can remember, what conversation you had with Mr. Guito at that time? First, let me ask you when, as near as you remember, did that conversation take place, the date?

A. I don't remember the date, at all. All I know is it was the last part of June.

Q. Last year?      A. Yes.

Q. Do you remember the time of day?

A. Well, it was around noon time, between eleven and twelve o'clock, that is the time he always comes around because my husband is there.

Q. Where did that conversation take place?

A. That was in my [21] tavern, I was behind the counter, and my husband was in a back room, and he called on me every Monday, and as he came in——

(Testimony of Mrs. Edith Gelsi.)

Q. Just a moment. Was there anyone else present besides you and your husband and Mr. Guito?

A. There were a few customers in the place, I don't remember who was there, how many I don't know.

Q. Now, will you tell the Court the conversation, what he said, what you said, and what your husband said?

A. Mr. Guido walked in the door and he said, "Good morning," and I said, "How are you?" And he said, "Fine, thank you," and he said, "How is your husband," and I said, "Fine, he is in the back room," so I called for my husband, so my husband comes in the room, into the tavern, and my husband started talking to him, and he said, "Have you any liquor today, any whisky today?" And he says, "Yes, but not much," and my husband says, "What have you got to sell?" And he said, "We have got some anchovies." My husband said, "We don't need anchovies, we have no grocery store around here and this is a tavern," and so my husband said, "What else have you got besides anchovies?" And he says, "Couldn't you use some anchovies?" And so my husband said, "Where is my wife?" And he talked to me and he says, "You can send me some." And so my husband said, "What else have you got?" So he opened up his show case, his suitcase, and he read out what he had down in his store, and so my husband asked him, "Have you [22] any whiskey?" And he said, "We are very low on whiskey." He said at that time it was very scarce, and so he went through the



(Testimony of Mrs. Edith Gelsi.)

list from A to Z what he thought he could sell and what we could use at the present time, and we said he had a little of everything else on the shelf, and my husband said, "How about some whiskey." And he said, "Well, I can sell you half a case." And then he made up the statement, and the statement was signed and he walked out. He never had much to say.

Mr. Coblentz: That is all.

Mr. Beedy: The invoice you are referring to is around or a little after the middle of June, was it not? The date is the 23rd, so it was a little past the middle of June.

Mr. Coblentz: That is the date of the delivery? Isn't that the date of delivery?

Mr. Beedy: No, that is the date you put in here in answer to the interrogatories that we propounded, so you fixed the date of the invoice as 6/23/44, and the invoice number was 46146.

Mr. Coblentz: The conversation was had before the invoice.

Mr. Beedy: I think that is so. It was around the middle of June, or after that.

### Cross-Examination

Mr. Beedy: Q. Now, how long have you been purchasing liquor from Coffin-Redington & Company?

A. Well, it will [23] be nine years I think in July, and I have been living here for the last thirty years, and all the business I have had with the

(Testimony of Mrs. Edith Gelsi.)

company they always gave me wonderful service. That is the least I can say about them.

They never forced me to do anything.

Q. They never forced you to take anything?

A. No, that is one thing they never did.

Q. So you voluntarily purchased everything that is on all of these invoices? A. Yes.

Mr. Coblentz: I object to that. That is for the Court to determine, whether the purchase was a voluntary one.

The Court: The testimony on direct examination did not indicate anything other than a voluntary order. I may be in error about that.

Mr. Coblentz: If Your Honor please, I submit that when a salesman comes in and is asked for some whiskey and he says whiskey is very short, what else can you use, and it is said my shelves are filled with everything else, and all I need is the whiskey, and he says what else have you got, and he says, well, can you use some anchovies, and he says this is not a grocery store, and he goes down the list and says won't you take this and won't you take that, and then afterwards he discovers that he has some whiskey that he did not have in the beginning, that is a violation.

Mr. Beedy: There was a case of anchovies that was in [24] the list, and Mrs. Gelsi testified that she and her husband talked and she bought them for their own use, and for what she could sell to her customers. That is what she said.

(Testimony of Mrs. Edith Gelsi.)

The Court: How much liquor was there in this transaction?

Mr. Coblentz: The invoice says one case of Olympic Anchovies.

The Court: How much liquor?

Mr. Coblentz: One and a half case of Red Horse Slow Gin, two cases of Baradi Rum Ambar Gold, two Barardi Rum Silver White, one-half case of Havana Club Gold, one-half case of Baret Brandy, and one-half case of Fitzgerald.

The Court: Those are all modern brandies.

Mr. Beedy: The Barardi is one of the oldest brandies in the rum business, and everybody wants it. It is one of the scarcest.

The Court: Is that all from this witness.

Mr. Beedy: I just want to bring out this—you ordered these anchovies?

A. Yes, my husband used them.

Q. Didn't you use them yourself?

A. Some, but they are a small can, No. 2, and now there are only two left.

Q. Two cans out of a case? A. Yes.

Q. Those are two-ounce cans?

A. I don't know just exactly, but they are small cans.

Q. You wanted those, didn't you?

A. Yes. [25]

Q. And you signed all of these orders voluntarily, or your husband did?

A. Yes, my husband did the signing, but I take

(Testimony of Mrs. Edith Gelsi.)

everything in. I receive all the merchandise that comes in, because he is never there when it comes in.

Q. Did you ever object to any of this merchandise?      A. No.

Q. Did you ever return any of it?

A. No, I never did.

Q. And you have been selling it?

A. I always did for the last ten years.

The Court: We will take a recess.

(Recess)

Mr. Coblentz: If your Honor please, I have located accurately now the Section that Mr. Beedy referred to.

The Court: Go on and develop the facts and I will give you an opportunity to argue the law.

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NAT LASSER

called as a witness by the Plaintiff; sworn.

The Clerk: Will you state your name to the Court?

The Witness: Nat Lasser.

Mr. Coblentz: Q. Mr. Lasser, you manage the Carlos Wines & Liquor Store?      A. I do.

Q. And you are the buyer there?

A. The buyer there.

Q. That is located at 2080 Chestnut Street?

A. Yes, sir.

Q. That is owned by your sister?      A. Yes.

Q. How long have you been manager?

A. Two years, or two [26] and a half years.



(Testimony of Nat Lasser.)

Q. Have you bought liquor during that time from Coffin-Redington & Company?

A. All the time.

Q. Do you recall making purchases from them in June of last year? A. I do.

Q. Did you take merchandise in that you did not order? A. Never.

Q. Never? A. Never.

Q. Never received any merchandise that you did not order? A. No.

Q. And you are what you call the house manager? A. Yes.

Q. Do you recall having made a statement to Mr. Richardson of the Office of Price Administration in August of last year?

A. Well, the statement he made is what he wrote in the report that he made.

Q. He wrote it first and you made the statement afterwards?

A. No, he wrote the report first and then there were some things in it I did not like and he kind of changed some parts of it.

Q. So that when you signed it it was a correct statement?

A. Well, he said it was a report of the bills that I had bought.

Q. Here is an invoice dated June 30. Did you receive the items listed there? A. I did.

Q. Did you order the two cases of Marin Rum Gold?

A. Two [27] cases. That is one of the items.

(Testimony of Nat Lasser.)

Q. One of P. M. de Luxe, one-half case of Hill & Hill? A. Yes.

Q. Half a case of Fitzgerald, and half a case of J. Baret Brandy? A. Yes.

Q. You ordered that?

A. My signature is on the bill.

Q. Did you order that Rum?

A. Yes, sure.

Q. Now, on February 9 did you order a case of Olympic Brand Filets of Anchovies.

Mr. Beedy: I object to that, if Your Honor please, as being without the issues of the case. The case is confined to buying liquor.

The Court: I will allow it subject to motion to strike, and overrule the objection.

Mr. Coblentz: Q. Did you order on or about February 9 a case of Olympic Brand Filets of Anchovies? A. I did.

Q. Do you have any of those left?

A. No, I sold them all but one.

Q. Do you recall when you sold the last of them except the one?

A. The one to Mr. Richardson, and I want that back.

Q. You want that back?

A. I would like to have it back, I want to take it home and eat it.

Q. And do you recall that in your statement you said that many times you took merchandise that you did not order or want?

(Testimony of Nat Lasser.)

A. No, I don't remember making that statement. [28]

Q. I will show you this. This is your signature, is it not? A. Yes.

Q. Would you remember the statement if you looked at it? Would you read that statement over?

A. Is this the one I signed?

Q. These are your initials on it, aren't they?

A. Yes.

Q. I think you had better read it.

A. Yes. I just glanced at it hurriedly while waiting on customers.

Q. And you recall that statement?

A. I recall signing it. What statement are you referring to there?

Q. I will read it to you.

A. There are some parts that are not correct.

Q. I will ask you the question, and if I read this wrong, will you correct me. "I many times took merchandise that I did not order or want." Is that right?

A. Not from Coffin-Redington, though.

Mr. Coblentz: I move that that be stricken as not responsive to the question.

A. That refers to other houses.

The Court: Just answer the question. What do you mean by that statement?

A. There are three different firms on the statement there, and that does not refer to Coffin-Redington. Some houses I do not have a salesman call on me and they would send me merchan-

(Testimony of Nat Lasser.)

dise. If I do not want the merchandise I would send [29] them back, but that statement refers to three different houses.

Mr. Coblentz: Q. I would like to ask you this, whether that is true of the Coffin-Redington & Company?

A. No, the salesmen have called me from Coffin-Redington and I signed what I took on each order.

Mr. Coblentz: Your witness.

Cross-Examination

Mr. Beedy: Q. How long have you been doing business with the Coffin-Redington & Company?

A. About two and a half years.

Q. You never have had any complaint about their way of doing business, have you?

A. No.

Q. Who was their salesman that called on you?

A. Mr. Levy.

Q. He called one or two times a week, did he?

A. Twice a month.

Q. Twice a month? A. Yes.

Q. You discussed with him what you wanted and he told you what he had to sell, is that right?

A. He told me what he had, and I would take what I wanted.

Q. That is what you did every time?

A. Every time.

Q. And the orders were made out right there in your presence? And you signed them?

A. That is right.

Mr. Beedy: That is all. [30]



(Testimony of Nat Lasser.)

Redirect Examination

Mr. Coblantz: Q. Mr. Lasser, will you look at this invoice and see if there are crosses next to items?

A. Yes. That is my signature there okeying the merchandise.

Q. I ask that that go out. Do you recall putting that cross there? A. Which one?

A. Both of them? A. Yes, sir.

Q. Do you ever remember that you said that you put a cross next to the items you did not want? A. No.

Q. Would you look at this statement, and if I read this incorrectly, will you please say so. "The merchandise that I did not order or want are shown by a cross with my initials 'N. L.' on the invoice of the following concerns:" And the third concern named is the Coffin-Redington & Company?

A. Yes.

Mr. Beedy: May I see that?

Mr. Coblantz: Yes.

Recross Examination

Mr. Beedy: Q. Now on Invoice No. 46505, dated June 30, 1944, there is a cross against two cases of Marin Rum Gold? A. That is right.

Q. And Invoice No. 41091, dated February 11, 1944, a single item on it, a case of Olympic Brand Filets of Anchovies. There is a mark against that?

A. Yes.

Q. You have already testified that you got the

(Testimony of Nat Lasser.)

Anchovies, that you ordered them, and that you used them all up personally [31] or sold them, and that you wished to have some more of them?

A. That is right.

Q. So they were merchantable goods that you could sell and did sell, isn't that right?

A. Yes, just as I sell olives and cherries.

Q. You say you sell all of those things, you have a nice store there?      A. Yes.

Q. The goods you have spoken of, anchovies, cherries, and so on, are things that naturally go with liquor, is that so?

A. People ask for them.

Q. And people who want to make mixed drinks ask for those things so that they can put them in their drinks?      A. That is right.

Q. Now, these two cases of Marin Rum Gold, have you sold those?

A. Yes, I sold those, and lots of others.

Q. You have ordered a great many more since then, haven't you?      A. I have.

Q. The same kind of Rum?      A. Yes.

Q. Now, did you read that statement when you signed it?

A. I just glanced over it; I had customers coming in and out and Mr. Richardson wrote that out, and he said it was just a report of the bills of the different wholesale houses of what they sent you.

Q. Did you check your invoices?

A. I did.

Q. From Coffin-Redington and other firms?

(Testimony of Nat Lasser.)

A. That's right. [32]

Q. Have you ever had any complaint about the way that Coffin-Redington & Company did business with you?

A. No, never. They treated me O. K.

Q. And is it a fact that you were required to take those two cases of Marin Rum Gold?

A. No. There was a mistake in one case, that is all. I think there were three cases ordered and I got one; there was one short.

Q. Another was when the order was originally written up it was for three cases of Marin Rum Gold?

A. I think so.

Q. Didn't you telephone to Mr. Levy, the salesman, the next day at Coffin-Redington & Company and tell him that you did not want three cases, that was a mistake, all you wanted was two cases?

A. I ordered three cases at first and then reduced it.

Q. You had originally ordered three cases?

A. Yes.

Q. And you telephoned him and reduced it to two?

A. Yes.

Q. Because that was all you wanted?

A. Because I took a case from another house. I got a case from another house.

Q. And so you reduced the order from Coffin-Redington & Company from three to two cases?

A. That is right.

Q. And do you remember the occasion of the visit of Mr. Richardson, the OPA Agent, out there?

(Testimony of Nat Lasser.)

A. Yes, I think it was in the month of August.

Q. It was August?           A. Yes.

Q. What did he say to you?

A. Well, he walked in and [33] he introduced himself and asked me for the bills of all three different houses, and I gave him the bills, and he went over the bills, and he saw the anchovies on the shelf, and he went up and took one off the shelf, and said do they sell you these, and I said, yes, and he said they have no right to sell you anchovies, they are not in the grocery business, and I said, well, I ordered them and I got them. So he said I will take this can and put that in the report.

Q. He put that in the report?           A. Yes.

Q. Did he say they had no right to sell you anchovies?

A. Said they are not in the grocery business, they are in the drug business, and the liquor business.

Q. You know that they do sell olives and anchovies, and things like that that are used in liquors, do you?

A. Well, I bought olives and cherries, and things like that.

Q. You bought things like that from them, did you?

A. From different houses that sell liquor.

Mr. Beedy: That is all.

Mr. Coblentz: That is all.



## FRANK H. RICHARDSON

called as a witness by the Plaintiff; sworn.

The Clerk: Will you state your name for the Court?

The Witness: Frank H. Richardson.

Mr. Coblentz: Q. Mr. Richardson, you are employed [34] by the San Francisco district Office of Price Administration? A. I am.

Q. In what capacity? A. Investigator.

Q. How long have you been doing that?

A. Two and a half years.

Q. Have you been investigating all different kinds of commodities?

A. Well, yes, in some cases.

Q. Have you investigated many liquor cases?

A. Quite a few.

Q. In fact, you are the only investigator for the liquor department, aren't you? A. Yes.

Q. Prior to those two and a half years what did you do, Mr. Richardson?

A. I was an auditor of the American Telephone & Telegraph Company.

Q. For how many years? A. Forty years.

Q. Do you recall visiting Mrs. Gelsie?

A. Yes.

Q. Do you remember when that was?

A. It was in the early summer of 1944.

Q. Would you tell the Court what conversation you had with her concerning liquor purchased from Coffin-Redington & Co.?

Mr. Beedy: If your Honor please, this is im-

(Testimony of Frank H. Richardson.)

peachment of the plaintiff's own witness in this case.

Mr. Coblentz: There is no question about that.

Mr. Beedy: There is no showing here that they are entitled to impeach them.

Mr. Coblentz: I think their own perjury shows that.

The Court: The objection will be overruled. Proceed. [35]

Mr. Coblentz: Q. I will show you this statement that has been referred to, to refresh your recollection. Do you recall taking that statement?

A. Yes, I do.

Q. Will you tell the court the circumstances under which that statement was written, or where you got the information for it, and whether you used this to compel them to sign?

A. This was at 6278 Mission Street, in Daly City. I met Mrs. Gelsie, who was behind the bar at that time, told her who I was, showed her my identification, and she called her husband, who, I believe, was in the back room, and I saw on the shelves that she had an awful lot of merchandise that was hard to sell, and asked her if she really ordered that merchandise, and she said no, she had not. Then I started talking to her and made up the statement and after it was finished it was read and signed, each page of it, and she made a sworn statement to the effect that she had read the statement and knew its contents, and made solemn oath that the thing was true and correct.

(Testimony of Frank H. Richardson.)

Q. Was that the entire conversation you had with her with respect to having a stock?

A. The conversation consisted of how it happened that she bought this merchandise, in order to make up the statement.

Q. After you wrote the statement out that you are referring to now, you asked her to sign it?

A. Yes.

Q. Have you testified to all the conversation that you recall? A. Yes.

Q. Did she say that any of the statements in there were not [36] true?

A. No, she did not. She read the statement and willingly signed it. They were just the facts that were given to me on paper and she signed it.

Q. Did you hear her testimony in court this morning? A. I did.

Q. Was that the story that she told you at the time of this conversation?

A. No, it was not.

Q. Will you tell the court what the conversation was at the time, as you recall?

A. During this period she was very angry at the company at the fact that she had to buy all of the other stock that could not be sold readily, and could not get any whisky, and talked very bitterly, and especially about the anchovies; she said she did not want them, did not know what they were going to do with the anchovies, that her husband and she could use maybe two or three cans. If I remember

(Testimony of Frank H. Richardson.)

rightly she said there was something like 100 cans there.

Q. In your capacity as an investigator, have you discovered whether or not anchovies have become scarce since that time?

A. I couldn't testify to that, I don't know.

Q. Now, I will show you the statement of Mr. Lasser and ask you if you recall the circumstances—that is in your handwriting, is it not?

A. Yes.

Q. Do you recall the circumstances under which you took that statement?

A. Well, I called upon Mr. Lasser, showed him my credentials, and we engaged in a general conversation in connection with whisky and items that were hard to sell. During [37] that conversation he showed me these anchovies on the shelf and a lot of merchandise he said was very slow in moving, that he had to take it all to get whisky. Then I started to write this statement and discussed it with him sentence by sentence; after it was finished he carefully read it and initialed each page of it and signed it.

Q. That is the entire conversation?

A. Yes.

Q. As you recall it?

A. As I recall it there was no conversation other than the fact that in order to get whisky he had to buy it.

Q. Did you hear his testimony this morning?

A. I did.



(Testimony of Frank H. Richardson.)

Q. Was that, as you recall, the conversation at that time and place?

A. No, it is not. He was very angry at the time that he had to buy all of this merchandise in order to get whiskey; he could not sell the merchandise, and the whisky was what he wanted.

Q. Now, I will show you the statement of Mr. Ferroni and ask you if that is in your handwriting.

A. Yes, it is.

Q. And do you recall taking that statement?

A. Yes, I took the statement.

Q. Is it correct, as Mr. Ferroni testified, that you told him you were with the government and he had to sign it?

A. No, I followed the same procedure with Mr. Ferroni as in the other cases. I showed him my identification and engaged him in conversation regarding whiskey and items he had on his shelves, [38] and he took me to his storeroom and showed me he had a lot of merchandise, which was classed as hard to sell, and some of it almost impossible to sell, and after looking at his stock I started to write this statement out and discussed it with him item by item as I put it down, and when I finished he read it and very willingly signed it; at the time he was very much angered at the fact that he had to buy a lot of stuff that he did not want.

Q. That is the conversation as you recall?

A. That is the conversation as far as I recall it.

Q. What is the date on that statement?

A. The date on this is August 7, 1944.

(Testimony of Frank H. Richardson.)

Q. Was that the date you took the statement?

A. That is the date I took the statement.

Mr. Coblentz: I would like at this time to call the Court's attention to the fact that Plaintiff's Exhibit No. 1, which is the invoice of Coffin-Redington to the Transport Cafe and shows nothing except whisky is dated August 8th, the day after the statement.

Q. Mr. Richardson, did you interview Mrs. Parker?      A. No, I did not.

Q. Do you know who did?

A. I think it was Investigator Nelson.

Q. Is he with your office any more?

A. He is not with our office.

Mr. Coblentz: That is all. [39]

### Cross-Examination

Mr. Beedy: Q. Mr. Richardson, you say that Mrs. Gelsi said that she got a lot of these things that she did not order. Did you say that?

A. Yes, I said that.

Q. Did she tell you at the time that she never ordered anything that it was her husband who did the ordering?

A. Well, she told me both of them did the ordering; she said they talked the thing over and got their heads together and did the ordering.

Q. Mr. Guito speaks Italian—he is the salesman who deals directly with Mr. Gelsi?

A. That may be, I don't know.

(Testimony of Frank H. Richardson.)

Q. Did she tell you she had nothing to do with the ordering, that her husband did it all?

A. No, she said part of the time she did and part of the time her husband did.

Q. Do you know that the license stands in her name, she is a citizen of the United States?

A. That may be, I don't know.

Q. You don't know that?

A. No, I took her own word, she said she was the owner.

Q. The license stands in her name, but didn't she tell you that her husband did all the ordering, and that she never put in an order of any kind?

A. No. In my conversation with her I understood that the both of them did the ordering, because he does not speak very good English, and she did the ordering.

Q. She said that?

A. Yes, if I remember correctly, when I was taking this statement, I said I wanted to talk to the people who owned it and ordered it. [40]

Q. What time did you go there, Mr. Richardson?

A. What time of the day?

Q. Yes.

A. I don't recall what time it was.

Q. Was it around in the morning or afternoon?

A. It was sometime between ten o'clock in the morning and three o'clock in the afternoon. What time it was I could not tell you.

Q. Did you see her husband?

(Testimony of Frank H. Richardson.)

A. Yes, I saw her husband and talked to both of them.

Q. Did she tell you about the size of the cans of anchovies? A. Yes, I saw them.

Q. They were 2-ounce cans?

A. They were small cans.

Q. Going to Mr. Lasser's statement, you knew he was buying from several firms, didn't you? He showed you invoices to that effect?

A. Yes, I saw invoices from several firms.

Q. What did you say about Coffin-Redington Co. to him? A. Nothing that I recall.

Q. You told him they had not right to sell anchovies to him, didn't you?

A. I didn't make that statement.

Q. You heard him say that?

A. I heard him say it, but I never made that statement. I did not make a statement of what they dealt in.

Q. You didn't know that?

A. No, I didn't know it.

Q. You saw the anchovies on the shelf, did you?

A. He mentioned the anchovies to me first, and showed them to me, and showed a can, a really large can, I think they sold for a couple of dollars apiece. [41]

Q. A 12-ounce can?

A. Yes. He was wondering what he was going to do with them, he never could sell them at that price.



(Testimony of Frank H. Richardson.)

Q. Is it a fact that all of these anchovies are imported goods, or don't you know that?

A. I don't know.

Q. Imported from Portugal?

A. I think it said on this can they were imported from Portugal.

Q. Yes, and they are very hard to get, do you know that?      A. No, I don't.

Q. You don't know and you didn't inquire about that?

A. I don't buy anchovies, I don't know.

Q. Take Mr. Ferroni, who runs a business down there in the Italian neighborhood—you know that, don't you?

A. No, I don't know whether it is an Italian neighborhood.

Q. Anyway, he has a great many customers who are Italian people?

A. There was hardly anyone in there when I was there.

Q. You went in during the day?

A. Yes.

Q. I presume they were there in the evening?

A. That is right.

Q. Did he tell you that he used all of these different liquors other than whisky for making coffee royals?

A. No, he did not. Coffee royals was never mentioned.

Q. It was never mentioned to you?

A. To me, no.

(Testimony of Frank H. Richardson.)

Q. He didn't say then what outlet he had for these other liquors that he was buying?

A. No, he did not; he was very angry at the fact that he was loaded up with a lot of Tequila, and rum and stuff like that. [42]

Q. Did he tell you that he bought this Anis Gorilla because he could use it in his coffee royals?

A. No, he didn't. He told me he had to take that stuff—he was not forced to take it, I believe, but he had to really take it in order to get the whisky.

Q. Now, you say he told you that he was not forced to take it?

A. In those words—could I see my statement that I took from him? It is pretty hard to recall, and I would like to see. He said he had to take merchandise he did not want in order to get whisky.

Q. Mr. Ferroni did not read that statement, did he?

A. Yes, he did—I read it to him.

Q. He said he did not. Did you read it to him?

A. He read it and signed it.

Q. Do you know whether he can read?

A. I know that he had it in his hand, I suppose he was reading it. He did not read it aloud, but I did.

Q. Did he tell you that in order to stay in the liquor business he had to get items other than whisky, to keep his customers he had to get something as a substitute for whisky or else he could not stay in business? Did he tell you that?

(Testimony of Frank H. Richardson.)

A. No, I do not recall his making a statement like that.

Q. That was a fact, was it not, and you knew it?

A. That I don't know.

Q. You knew whisky was scarce in 1942?

A. I don't know whether [43] he could keep in business or not; I knew whisky was scarce.

Q. And if he could not get whisky and sell it he had to get some other alcoholic beverage to take its place?

A. That might be, I don't know.

Q. You don't know that. Didn't he tell you that?

A. No, he did not.

Q. Weren't you the one that pointed out to him that a great many of the articles that you saw on the shelves were slow movers?

A. It was not necessary for me to point them out, he knew it.

Q. But you did——

A. I might have mentioned the fact that certain merchandise was slow moving, something like that.

Q. Didn't he say to you that he had plenty of space and had an outlet for it all?

A. Oh, no, he was angry at the fact that he had so much of this merchandise that was hard to sell and he could not get whisky.

Q. Don't you think he was angry at you rather than at the merchandise?

A. I don't think so.

Q. Didn't he at first refuse to sign a statement?

A. No, he did not.

(Testimony of Frank H. Richardson.)

Q. Didn't he say "No, I won't sign," and you said this is a statement that you would like to have him sign, it won't hurt anybody?

A. No, that is not a fact. He read the statement and signed it.

Q. Didn't you say, "Won't you sign a complaint against Coffin- [44] Redington Company, and he said, "No, I won't?"

A. No. I would not make that kind of a statement. We do not issue complaints that way.

Q. Didn't you explain that it was not a complaint, that it was just a statement? Do you recall that?

A. No, I don't recall that at all. The question of a complaint never came into it, as far as I know.

Q. Now, isn't it a fact that after he first refused to sign what you would call a complaint, you said, "This is only a statement," and when he refused did you show him your badge and say, "You had better sign that?"

A. I have no badge.

Q. You had no badge at that time?

A. I have no badge at all. I never made that statement to him.

Mr. Beedy: That is all.

The Court: We will take a recess now until two o'clock.

(A recess was taken until two o'clock p.m.)



## Afternoon Session

Mr. Beedy: If your Honor please, I was going to call Mr. Richardson back, but I have talked to Mr. Coblentz, and I think we can perhaps stipulate to the facts.

Mr. Coblentz, will you stipulate that on June 20, 1944, the War Production Board issued an order permitting the distillers to make whisky for the month of August amounting to fifty million gallons?

Mr. Coblentz: I don't know the fact as to the amount, nor even as to which agency it was, but it was a matter of general knowledge, and I will stipulate that at the time that is involved here whisky was very scarce, and that actually the government permitted the whisky distilleries to make more whisky, and the amount available thereafter was greater than before. Is that satisfactory?

Mr. Beedy: My point, Mr. Coblentz, is that the order was issued in June and the effect of allowing the distillers to make whisky in the month of August to the amount of fifty million gallons resulted in the distilleries releasing a lot of whisky that they then had on hand.

Mr. Coblentz: I don't know what the facts are, Mr. Beedy.

Mr. Beedy: Well, the fact is, and it was common knowledge, and you knew that in the OPA, that the War Production Board did permit the manufacture of fifty million gallons of whisky [46] by the distillers, and that eased the difficulty of getting whisky that had prevailed. I am not sure

that Mr. Richardson has knowledge of that, but I think your Honor would take judicial notice of the orders of the War Production Board and agencies of that kind.

The Court: Proceed.

Mr. Coblentz: If your Honor please, in answer to the interrogatories served and filed we listed a number of persons to whom these sales were made. We called all of them now to the witness stand except Giovanni Mori, who is ill, and I spoke to his doctor over the phone, a Dr. Kennedy, who is attending him, and it will not be possible for us to produce him as a witness, and with that explanation the plaintiff will rest.

Mr. Beedy: Do you rest?

Mr. Coblentz: Yes.

Mr. Beedy: The defendant will move for a dismissal of the case upon the ground that upon the facts and the law plaintiff has shown no right to relief in this case. Regulation 445 prohibits the selling of alcoholic beverages for a price higher than the ceiling applicable to such sales, and the regulation further states that this price ceiling shall not be evaded either directly or indirectly in any manner. That is the section that Mr. Coblentz called your attention to this morning. In other words, the essence of the complaint here is that the [47] defendant violated the ceiling price by overcharging for certain commodities. Plaintiff has not shown that, he has not made his case. Now, the plaintiff here contends that the defendant sold persons unwanted items or certain undesired items, and that

this amounted to a sale of desired items at a price which the purchaser paid that resulted in a violation of the ceiling price.

It is our contention here that all items were sold at the ceiling price placed upon them by the Office of Price Administration. Your Honor will recall that was stipulated to this morning, that all of the items had a ceiling and that all had been sold within the ceiling price, and where several of those items are sold during the same transaction and none of them over the ceiling price there could not possibly be a violation of the price ceiling.

Of course, it is conceivable where one item sold has an established ceiling and one of the items does not, the total price received for both items is higher than the ceiling price. That is what did occur in that case decided by the District Court in Connecticut. There the bananas had a ceiling price and the tomatoes did not have a ceiling price, and there the Price Administrator established the fact that the seller required, when he sold bananas that he take a certain amount of tomatoes, and it was held to be a violation; the tomatoes were not regulated. But we have not that case here. We [48] have a case here where every item sold at the ceiling price placed on it by the OPA and no sale was made above that ceiling price. So we have a situation where every item was sold at a price fixed by the Office of Price Administration. There are no facts in this case to show that any purchaser was compelled to or forced to take any item that he did not want.

This is a suit in equity for an injunction, and your Honor is being asked to issue an injunction to prevent this firm from selling whisky upon the condition that the purchasers would take certain items like Roman gin and other things, and there is no showing of any kind that defendant ever did that, and there is no reason why an injunction should issue to prevent them from doing something they never have done and did not intend to do.

Mr. Coblentz: If your Honor please, I would like to read that section that we referred to this morning. "The provisions of this regulation shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to any commodity, or service covered by this regulation, alone or in conjunction with any other commodity or service, or by way of finder's fees, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement, combination sales or trade understanding; by any change in style or manner of packing; [49] by requiring the buyer to purchase packaged distilled spirits or wine on a per-drink basis; or in any other way. The specific enumeration of acts constituting evasion is illustrative but not exclusive."

Now, there is certainly testimony here—this is a motion to dismiss, and I understand that the Court will take as true all evidence in plaintiff's favor and disregard the other—there is certainly testimony in the record of a tying agreement and combination



sale, and that constitutes an evasion of this regulation by the sale of whisky at a price above its ceiling, where other items were delivered at the same time which were not desired by the purchaser.

The Court: The motion will be denied at this time.

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SHERWOOD COFFIN,

called as a witness on behalf of defendant; sworn.

The Clerk: Will you state your name to the Court, please?

A. Sherwood Coffin.

Mr. Beedy: Mr. Coffin, where do you reside? Where do you live?

A. In Marin County, San Rafael.

Q. Are you an officer of Coffin-Redington & Co.?

A. Vice-President and General Manager.

Q. And that company is a corporation, is it not?

A. Yes.

Q. And has been since 1921? A. Correct.

Q. And it and its predecessors have been in business in San [50] Francisco since 1849, have they not? A. Yes.

Q. Now, what is the nature of your business, Mr. Coffin?

A. We are wholesale druggists and wholesale liquor dealers.

Q. What were your gross sales during the year 1944?

A. Roughly, nine and a half million dollars.

(Testimony of Sherwood Coffin.)

Q. And during 1943 do you recall what they were?

A. Something over eight million dollars, nearly eight and a half million.

Q. You do, as a part of the business of that concern, a great deal of business with different government agencies, do you not?      A. We do.

Q. And in the internal administration of the business, have you it divided into two divisions?

A. We have a drug division and a liquor division, with a liquor division manager.

Q. Who is the manager of your liquor division?

A. Edwin Schloss.

Q. Who is manager of your drug division?

A. Well, I am the general manager, and in the drug division the details would be up to me, and in the liquor division they would be up to Mr. Schloss.

Q. Mr. Haaf is a director of the company, and vice-president, and has charge of liquor sales?

A. General sales manager of liquor.

Q. The liquor division of the business during 1943 was what percentage of the whole business, Mr. Coffin?

A. Something less than 20 per cent.

Q. And in 1944 what was it?

A. Slightly above 20 per cent. [51]

Q. What is the policy of the company in respect to the management and sale and matter of that kind?

A. Our endeavor is to observe all laws govern-

(Testimony of Sherwood Coffin.)

ing our business. We have narcotics and liquor and various other articles that have special laws concerning them, and we endeavor to observe all of those laws strictly. We endeavor to serve our customers fairly and see that everybody has a square deal, so to speak.

Q. And in that respect you have cooperated, have you, with all of those government divisions?

A. We have endeavored to.

Q. Including the OPA?

A. Including the OPA.

Q. And they have been down and investigated these various sales, have they not?

A. I believe they did investigate them.

Q. You afforded them all the facilities that they asked for, did you not?      A. We did.

Q. You turned over your invoices to them so that they could select any ones they wanted to, is that right?

A. We did, that is our policy. We have done the same thing with the Pure Food & Drug people, and various other special agencies.

Mr. Beedy: That is all.

### Cross-Examination

Mr. Coblentz: When you say that your liquor constitutes approximately 20 per cent of the business, what is that by volume?

A. By volume?

Q. Do you keep the profits on sales separately?

A. Yes.

(Testimony of Sherwood Coffin.)

Q. What is the average gross profit on your drug sales? [52]      A. Around 16 per cent.

Q. And on liquor sales?

A. A little less than that, I think it is 13 or 14 per cent.

Q. You say your policy is to show the records to the government agencies; with respect to the OPA, you are aware that is also a requirement of the law?      A. We endeavor to obey the law.

Mr. Coblentz: That is all.

Mr. Beedy: That is all, Mr. Coffin.

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EDWIN SCHLOSS,

called as a witness by defendant; sworn.

The Clerk: Will you state your name to the Court, please?

A. Edwin Schloss.

Mr. Beedy: Where do you live, Mr. Schloss?

A. Atherton.

Q. What is your business?

A. I am manager of the liquor division of Coffin-Redington & Co.

Q. How long have you been such?

A. Pretty close to three years.

Q. What was your business prior to that?

A. I was manager of another distributor here for several years.

Q. Have you been in the liquor business since the repeal of prohibition?



(Testimony of Edwin Schloss.)

A. At the time of repeal I was appointed Pacific Coast Manager of the Continental Distillery, and held that position for seven years. [53]

Q. What distilleries does Coffin-Redington & Co. represent?

A. National Distilleries, Calwa, Hiram Walker, Continental and Stitzel-Weller and Medley.

Q. You have bulk whisky of your own in Kentucky?

A. In two distilleries we have bulk whisky.

Q. In which ones?

A. Stitzel-Weller and Medley.

Q. Where are those situated in Kentucky?

A. The Stitzel-Weller is at Louisville, just outside of the suburbs, and Medley is in Owensboro, Kentucky.

Q. When did whisky first begin to get scarce, Mr. Schloss?

A. In the latter part of 1942.

Q. What did you do to meet the situation of shortage?

A. The demand became tremendous by the accounts that had been doing business with us, so we made a breakdown of their purchases for the first eight months of 1942 to find out what value each account had as a customer, and therefore could trace the amount of whisky that we could allot to that account; I speak of whisky and other spirits.

Q. How many customers did you have?

A. You mean at that time?

Q. Yes.

A. In 1942 there were about 700 customers in

(Testimony of Edwin Schloss.)

straight liquor, I mean by that package goods, stores, and places where liquor alone was sold.

Q. Then you had other customers who were druggists, also? A. Yes, we had druggists.

Q. How many of those were there?

A. Well, there were [54] approximately, I would say, something over 1000 drug accounts that had been doing and still are doing business with Coffin-Redington & Co.

Q. These allotments that you speak of are applicable to all of your customers, whether druggists, or not, aren't they?

A. Well, it was handled in a manner that as far as liquor customers were concerned we made a breakdown of what they were entitled to, and so informed the salesmen that called on them, and the drug customers were handled by the Drug Department, which was familiar with them; some of those customers have been on the books for thirty, or forty, or fifty years, and knew what they were entitled to on the basis of their value as a customer.

Q. Did you instruct your salesmen in respect to these allocations?

A. They were all advised as to the previous purchases of the account that they called on in dollars and cents. They were given the information of the purchasers in the first eight months of 1942 to be used as a guide, because of the pressure on the salesmen, many of them were old friends, many of our men having been calling on them for seven or eight or nine years, and they endeavored to get as

(Testimony of Edwin Schloss.)

much as they possibly could from our men, and we wanted to have the yearly sales as a unit of measurement, so we gave them the information for the eight months of 1942, which was considered normal times.

Q. Did they communicate that to the various customers when they called on them?

A. Yes. [55]

Q. You were informed of that?

A. Yes. They were informed as to what each customer could expect from us on the basis of previous purchases.

Q. What competition does your company have—how many wholesale distributors are there in San Francisco?

A. Well, there are about thirty distributors in San Francisco, and we have to compete with them because they have approximately the same line as we have.

Q. You mean thirty in San Francisco, and thirty out in the Bay Area in addition to those?

A. No, I mean that there are about thirty in the immediate Bay Area that we would consider competitive.

Q. Does your company sell olives, anchovies, cherries, and thing of that kind?

A. We always have sold olives and cherries and things of that nature; we have to do that in the liquor business, that is closely connected with the liquor business. As a matter of fact, the ideal situation would be to set up a hotel and club supplies department, where these various delicacies

(Testimony of Edwin Schloss.)

could be obtained from us, and many of the imports we carry would also fall in that category.

Q. Are the supplies of delicacies such as anchovies and pate de foie gras restricted?

A. They are very restricted, they are difficult to get. As a matter of fact, there were many times we were out of cherries and various sizes of olives, and also that is true of anchovies and other articles which [56] could not be obtained.

Q. Anchovies have been the subject of some questioning. Do you know whether these were imported?

A. They were imported from Portugal in pure olive oil. They are considered one of the finest types of delicacies, and they are used quite generally in connection with liquors.

Q. During the eight months from February to July, 1944, the complaint charges certain of your customers were compelled to buy brandy, rum, and other things in order to buy whisky. Is that true?

A. That has never been the policy to force any merchandise on anybody at any time.

Q. As a matter of fact, during this eight-month period, and generally, do retailers return to you items such as gin, rum, tequila, and so on when they do not want it?

A. Yes, we have occasions where we have made a record of where they have made returns of that kind and we gave credit for it. There were various times they informed us that they did not want the merchandise and we cheerfully and willingly have



(Testimony of Edwin Schloss.)

taken it back. Among those items you made mention of there you spoke of rum. In that period covered there were people that for various reasons did not want rum, and we have set up a credit for 94 1/3 cases of rum which we took back; a copy of those credits is here. We have established that as a policy, and anybody at any time that did not want, for various reasons, or any reasons sufficient to us, they could return it to us at will, and those credits were established for those various accounts. [57]

Q. Did your customers know that?

A. They always knew that it was our policy.

Mr. Coblentz: If your Honor please, we ask that the conclusion of the witness as to whether his customers knew something or not, be stricken out.

The Court: Develop the facts.

Mr. Beedy: These so-called unwanted items that I spoke of, like rum, Bocardi brandy, etc., were those items restricted, too?

A. Everything we had there you are covering in the invoices was allotted and allocated to the salesmen, and they always had to be allotted, and I allot that merchandise to their accounts; it was never an open item because of our inability to replace them, and we had to restrict it for that reason.

Q. You used the words "restricted items" and "open items." What do you mean by restricted? Are restricted items those items that you were not able to keep fully supplied with?

A. Yes. Subsequently what we did there as merchandise became available after the holiday we had

(Testimony of Edwin Schloss.)

in August, there were certain things that could be released that we could put on as open items, that could be sold at the wishes and desires of our customers. Others had to be still restricted, because our suppliers could not supply us with unlimited quantities of certain things.

Q. Take rum, for instance, that has been spoken of here, and is [58] on a number of these invoices, was rum hard to get, or easy to get?

A. Rum was very limited, and it was difficult to secure the quantities of rum that our customers wanted, and we were unable to sell to them to fill their needs, it was definitely restricted. Rum came into this country and it had to be used as a substitute because of the limited amount of other spirits that were available.

Q. Bocardi rum which was spoken of, isn't that a high quality of rum?

A. That is the cream of rum, the Bocardi people are famous and they do a business—it is not only national, but it is international, all over the world; a very limited supply of Bocardi rum has come into this or any other market.

Q. Was that a restricted item, too?

A. It still is.

Q. Is that true, or what have you to say about Baret brandy? Is that a brandy that is of good quality?

A. It is an excellent quality. Baret brandy is made by, that is, it is bottled by the Many Blanc Company, of Chicago. As a matter of fact, the lim-

(Testimony of Edwin Schloss.)

ited quantity that we had of Baret brandy, which was a small quantity, was our own brandy made in California at the Alta Winery, in Dinuba, and we made a deal, transaction, whereby we sold at OPA prices our bulk brandy to the Many Blanc Company, and then in turn sold 1000 cases under their line of Baret brandy, it was our own brandy, and we were very fortunate in getting it.

Q. Is that a good quality of brandy?

A. Excellent. [59]

Q. Now, Mr. Schloss, did you give any directions to your salesmen in reference to the sale of whisky?

Mr. Coblantz: If your Honor please, I am going to object to that as to whether or not he gave instructions to them, as a conclusion. If he wants to ask what statements he made to the salesmen that is perfectly satisfactory.

The Court: He may answer.

Mr. Beedy: Did you give instructions to your salesmen—just answer that “Yes” or “No.”

A. Yes.

Q. Were those in writing, or verbal?

A. There were some in writing at times and others were verbal, regarding the policy of the company at all times.

Q. Were those restricted to the salesmen?

A. They were restricted to the salesmen.

Q. Have you copies of any of those?

A. I have not copies with me here. We have a record of instructions to salesmen as to their duties.

Q. Do any of those instructions relate to these so-called tie-in agreements?

(Testimony of Edwin Schloss.)

A. The instructions definitely were to the effect that we had no such thing as tie-in sales. It has always been the policy of Coffin-Redington & Co. to offer our merchandise on a legitimate basis, in keeping with all regulations, which, of course, includes the OPA.

Q. During the period you have spoken of, Mr. Schloss, when was it that the sale of whisky began to ease up so that you could [60] get more of it?

A. Well, in anticipation of the August, 1944, so-called liquor holiday we anticipated and we began to get a little larger supplies during June and July, and from August on until the beginning of the year.

Q. Was it after those dates that you were able to give your customers more whisky than you had before?

A. Yes.

Q. And you did, did you not?

A. Yes.

Q. Isn't it a fact that many of your customers, who prior to that time had purchased some whisky and rum and gin and tequila, and other items, began to purchase whisky alone?

A. That is correct, here. We have records, here, if the court is interested in them, in which there are many orders that are nothing but whisky and represent no other items of any kind. These are all orders, straight whisky orders, over the period of time that you are seeking information on.

Q. That is, you mean during July and August of 1944?

A. February to July.

Q. Now, Mr. Schloss, is it not a fact that the retail liquor dealer was faced with the problem that he



(Testimony of Edwin Schloss.)

had to find substitutes for whisky if he intended to stay in the liquor business?

A. Well, it was definitely established that it was our duty to keep our customers in the business, and we made purchases of merchandise which proved itself to be sound merchandise, and sold it to our customers, and on the straight whiskey basis the customers in many instances would have gone out of business, they [61] would have to go out of business, there was an insufficient quantity of whisky from any source to keep them in business so that they could make a living.

Q. Do you know what the company liquor sales were from February to July, 1944?

A. Approximately a million dollars gross sales.

Mr. Beedy: That is all.

#### Cross Examination

Mr. Coblentz: Mr. Schloss, what were your duties as manager of the liquor division of Coffin-Redington & Co.?

A. Well, my duties were of a varied nature, to purchase, supervising, policy-making and planning.

Q. Did you supervise all departments?

A. All departments of the liquor division?

Q. Yes. A. Yes.

Q. You were in effect the purchasing manager of such items as you purchased, and the sales manager?

A. That is correct.

Q. Do you recall just what you told your salesmen with respect to how they were to dispose of the items that Mr. Beedy referred to as the unwanted items?

(Testimony of Edwin Schloss.)

Mr. Beedy: I called them the so-called unwanted items.

A. I don't think that there were any unwanted items, because the proof is that they have been sold, and we now find that they are hard to replace, many of the things that we had at that time which are your so-called unwanted items that you have found some fault with.

Mr. Coblentz: Q. Mr. Schloss, what did you mean when you [62] answered Mr. Beedy's question to the effect that you gave the salesmen a certain allotment of those so-called unwanted items, and instructed them to allot them among your customers?

A. They were on an allotment basis; they were not items that we could quickly and in unlimited quantity replace, so their sales were restricted. I think the reason this name "unwanted items" came in here is because of the fact it has been conveyed here that they were not wanted. They were wanted items at all times, and still are.

Q. Mr. Schloss, you referred to a Baret brandy. There are several kinds of brandy, aren't there?

A. There are many kinds of brandy.

Q. They are made from grapes, and originally the word was brandy wine?

A. Yes, it is a distillation of grapes.

Q. A distillation of grapes?

A. Basically it originates in the grapes.

Q. As I understand it, this Baret brandy, bottled in Chicago, I think you said, was considered to be a very fine brandy?

(Testimony of Edwin Schloss.)

A. That is correct.

Q. And so fine that you had their label, with their permission, placed upon some brandy that you had distilled down in Dinuba?

A. That is correct.

Q. So that the public thought they were getting this very fine Baret brandy when, as a matter of fact, they were getting Dinuba brandy?

A. That is only the geographical name, it was [63] Alta Winery Brand. We had a bulk brandy that was five years old and considered the best quality of brandy that was produced in the State of California, it was superior in quality, and the only reason that we had any thought of putting up the brandy on that basis was because of the popularity of the Baret Brandy in this community. It sold very readily, and still does.

Q. As a matter of fact, Mr. Schloss, the California wines and California brandies are the best in the country, and used to be shipped into France and shipped back and sold as French wines and brandies, didn't they?

A. A great deal of our California brandy used to be shipped to France and there it was blended along with Cognac, and it came back as Cognac brandy, and we know it as Martell and various other brands, and much of that came from California, or from Africa.

Q. And Dinuba is right down in the heart of the grape district, is it not? A. That is correct.

Q. A little south and east of Fresno?

(Testimony of Edwin Schloss.)

A. Yes.

Q. Do you know of any grapes grown in Illinois?

A. There are some grapes, but it is not a grape-producing community. I would not say that that would have anything to do with where it was branded. The Many Blanc Company advertised in *Esquire* and *Life* and other magazines, and it has had an excellent reputation at all times.

Q. To get back to the so-called unwanted items, is it your testimony that there is no such thing, and that that there never was? [64]

A. As far as we are concerned there were no unwanted items.

Mr. Coblentz: That is all.

Mr. Beedy: That is all. I will call Mr. Levy.

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MORRIS LEVY,

called as a witness by the defendant, sworn.

The Clerk: Will you state your name to the Court?

A. Morris Levy.

Q. Where do you live, Mr. Levy?

A. 3005 Clay Street, San Francisco.

Q. Where are you employed?

A. Coffin-Redington & Co.

Q. How long have you been employed by Coffin-Redington & Co.?

A. A little better than two years.

Q. As a salesman? A. As a salesman.

Q. What was your business prior to that?



(Testimony of Morris Levy.)

A. Previous to that I was in the radio business for twenty years on Market near Sixth.

Q. Did you call on Mr. Lasser, Mr. Levy?

A. Yes, I called on him regularly, twice a month.

Q. And Mr. Ferroni, also?

A. Mr. Ferroni, also.

Q. Those are two customers who have their place of business down in the Marina district?

A. That is right.

Q. How often did you say you called on them?

A. Twice a month.

Q. Each one? A. Each one of them.

Q. Now, did you get your allotments from Mr. Schloss as to what you could sell the customers that you called on? A. Yes. [65]

Q. And you called on those customers and told them what you had to sell them, is that so?

A. That is a salesman's job. I walked into their place of business and offered them my merchandise for sale.

Q. Take Mr. Ferroni, where is he located?

A. On the corner of Union and Buchanan, I think.

Q. He has the Transport Cafe?

A. Transport Cafe, now called the Transport Club.

Q. He is an Italian?

A. He is an Italian.

Q. By nationality? A. Yes.

Q. What was his business out there?

A. He had primarily a bar, he served a few sandwiches, and he has got a card room in the back of the

(Testimony of Morris Levy.)

bar and serves all kinds of drinks, but his main business is coffee royals; he does a tremendous business in coffee royals.

Q. Now, in June and thereabouts, Mr. Levy, you were calling on Mr. Ferroni and selling him goods of various kinds, weren't you?

A. I called on him, as I said before, twice a month. and sometimes even more, sometimes three times a month.

Q. What was your method of making out the order, there?

A. Well, I suggested various different articles that I had for sale, a list of whatever we had that particular month, whisky, rum, brandy, tequila, vodka, and anything that we had for sale, and asked him what he could use. He said, "Well, I could use some of this, I could use some of this, I could [66] use some of this," and it is the salesman's business to suggest to them, "I have this, and this," and then if he says "Okay, I will take some of that," I take the quantity and put it down on the order, and then when the order is completed I say, "Now you are sure you have not forgotten anything?" And he says, "No, that is about all," and I say, "Okay, here is your order; sign it." And the signature appears on the order.

Q. On each order?                      A. Each order.

Q. Now, whisky was scarce around June, or at least prior to June, May, June, July, February and March?

A. Very much so.

(Testimony of Morris Levy.)

Q. Did he purchase articles other than whisky as shown on these various invoices?

A. He surely did, he bought some of the merchandise that I had and bought it very willingly, because he dealt very largely in coffee royals, he bought rum, and brandy, tequila, particularly for the foreign element.

Q. Did you at any time, Mr. Levy, ever require Mr. Ferroni to purchase any articles in order to get whisky?

A. I never have. Having been in the retail business myself, for better than 25 years, I always made it a policy to treat my customers the same as I would like to be treated, myself, and not force them at any time, to take anything. I told them what it was, if he was not quite familiar with it, and naturally he was only too glad to get it.

Q. Did he sell these articles, do you know?

A. Every day—he uses them every day. [67]

Q. And he repeated the orders from time to time, did he not? A. Very much so.

Q. Of brandy, tequila, and other articles?

A. Yes. In fact, once he mentioned Anis Gorilla, he wanted that, brandy and anisette, because he had been looking for it for some time and could not get it for a long time, he did not have any, and the Italian people like it and use it in some quantities.

Q. Now, coming to Mr. Lasser, where is his place of business?

A. On Chestnut Street, the 2000 block, I think.

(Testimony of Morris Levy.)

Q. He has a delicatessen store and bar there, has he?

A. No, he has what is called a packaged good store, he has a very beautiful store, I would call it one of the outstanding stores on Chestnut Street in the Marina District. He sells all kinds of wine, all kinds of liqueurs, cherries, olives, cigars, cigarettes, and all of the soft drinks, anything that pertains to that business.

Q. Did you sell him whisky, and rum, and brandy, and gin, and tequila?

A. Yes, I sold him everything I had to offer.

Q. All of those things?           A. Yes.

Q. Did you ever at any time make a sale of any of those articles with the condition attached to it that he had to take them in order to get whisky?

A. That was not our policy, it was not the policy of the house, and there is no reason for a salesman to force anything on a particular customer if he expects to go back to him. [68]

Mr. Coblentz: I ask that that go out as not responsive to the question. The question was whether or not he said that to Mr. Lasser.

The Court: It may go out.

Mr. Beedy: Will you read the question?

(Question read by the reporter.)

A. No, at no time.

Q. Did Mr. Lasser at any time tell you that he did not want or could not use or found that he was supplied with—

A. There was one particular instance where Mr.



(Testimony of Morris Levy.)

Lasser placed an order with me for three cases of Marin Rum, he was practically out of it, and he ordered three cases. The following morning he phoned to the office that due to the fact that another house sent him a case of it and wanted us to cut it to two, so I did, and he appreciated it very much.

Q. You would do that?

A. I would do that for anybody, I would have cancelled it, because we could have sold it a hundred times over.

Mr. Beedy: That is all.

### Cross Examination

Mr. Coblentz: Q. Mr. Levy, as I understand it you have been with Coffin-Redington for the past two years? A. A little better.

Q. Was Mr. Lasser your customer all that time?

A. Yes.

Q. Do you know whether anyone else from your firm called on [69] him?

A. No one else called on him.

Q. So that his only contact with Coffin-Redington Company was with you? A. Through me.

Q. Did you have a quarrel with him at any time. Did you ever do anything which you know now or then knew that displeased him?

A. Not to my knowledge.

Q. Or anything that the firm ever did?

A. No.

Q. If you were told, as was introduced in evidence this morning, that both of these gentlemen com-

(Testimony of Morris Levy.)

plained to Mr. Richardson, of the Office of Price Administration, that they were compelled, each of them was compelled to purchase other items that they did not wish in order to get whisky from your firm, and you have testified that you did not say that to them, how do you account for their having made that statement to Mr. Richardson?

A. I do not see how they could have made it.

Mr. Coblentz: That is all.

Mr. Beedy: That is all. I will call Mr. Guito.

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PETER GUITO,

called as a witness by the defendant, sworn.

The Clerk: Will you state your name to the Court, please? A. Peter Guito.

Mr. Beedy: Q. You are a salesman of Coffin-Redington & Co.? A. I am.

Q. And for how long have you been such?

A. A little over nine years. [70]

Q. In the liquor department?

A. In the liquor division, yes.

Q. Did you call at Gelsi's place out on Mission street regularly? A. Yes, I did.

Q. How often did you go there?

A. Oh, once a week, once in a while I would skip a week.

Q. Is the place in Mrs. Gelsi's name?

A. That is correct.

Q. What is her husband's name?

(Testimony of Peter Guito.)

A. Enrico—it begins with an “E.”

Q. You know him, do you not?

A. Very well.

Q. Now, how long have you known them?

A. Ever since I have been calling there.

Q. How long has that been?

A. Well, practically for nine years.

Q. Has he been there during that time, nine years?

A. Yes.

Q. And you have sold him all that time liquors such as are carried by the firm of Coffin-Redington & Co.?

A. I have.

Q. Who was the person with whom you discussed orders—who was the person who gave you the orders out there?

A. Mr. Gelsi.

Q. You could speak to him in his own language?

A. I could.

Q. Is he the manager of the place?

A. Yes, he is.

Q. Now, what time of day did you usually call there?

A. Well, I generally called there about twelve, if you do not call there about then you do not catch them.

Q. He is not there?

A. If you got there a few minutes after one you do not catch him, unless you get there after four o'clock. [71]

Q. What was your method of taking orders from him?

(Testimony of Peter Guito.)

A. Well, I would go in and show him what I had for sale, and he would buy it.

Q. Ask him what he wanted, is that it?

A. I would tell him what I had to sell, I offered him whatever I had and he would buy what he wanted. Sometimes he would want something we did not have and I would make a note of it, and when we got it I would tell him. I would tell him, we have so and so, if he wanted it.

Q. Who wrote the order, did you?

A. I wrote the order.

Q. Did he sign it?

A. He always signed it.

Q. Did Mrs. Gelsi sign any orders?

A. No.

Q. You generally met Mr. Gelsi in the room that was spoken of in back of the bar, didn't you?

A. He would be in the back, so I would go back there and we would do our business there; sometimes when he gave his wife checks to deposit he would be standing up in front.

Q. The bank is right across the street?

A. Right across the street.

Q. It is alleged in the complaint in this case that Bocardi rum was an unwanted item there. Isn't it a fact that Mr. Gelsi had been trying to get that for months before you sold it to him?

A. For months, and I had a note in my book to fill his order on that just as soon as we got it in.

Q. According to the invoice you sold him four or five cases [72] Bocardi rum amber gold and Bo-



(Testimony of Peter Guito.)

cardi rum silver white. That is what he wanted to get?

A. Yes, he asked for that.

Q. What did you give him?

A. At first I told him we could only give him a case, but I told him we might pick some up elsewhere, and as soon as it came in I got in touch with him again and told him I would give him two cases instead of five that he wanted, and he was glad to get them.

Q. Now, did Mr. Schloss, the manager of the liquor division tell you and the other salesmen at sales meetings what the policy of the house was in relation to the so-called tie-ins?

A. He did.

Q. Did you ever sell to Mr. Gelsi or Mrs. Gelsi whisky on condition that they would purchase rum, tequila, gin, or any of the other items?

A. No.

Q. As a matter of fact, when whisky was easy to get you did sell Mr. Gelsi on occasions just whisky alone, isn't that true?

A. I did, if that is what he wanted, and if he wanted anything else that is what he got.

Mr. Beedy: That is all.

### Cross Examination

Mr. Coblentz: Q. You were in court this morning, were you not?

A. Yes.

Q. You heard all the testimony?

A. Yes.

Q. How do you account for the statement that the Gelsis made to Mr. Richardson?

A. I don't think she would make the statement [73] voluntarily.

(Testimony of Peter Guito.)

Q. You think Mr. Richardson forced her to?

A. I think most of these people, particularly Latins, if they are told it is a government man, they are scared, and if a government man comes in he can get almost anything out of them.

Q. What is the connection between being afraid and being a government officer and making some special statement?

A. In what way?

Q. I can understand when a person is frightened they might run or they might hide, but why should they choose to make some particular statement that is not true?

A. If a government agent comes in, they have a fear of them, and they seem to think "Maybe I should do this or do that, or the other," they may have broken the law.

Q. So out of their fear they brought this out of their imagination?

A. I don't think they brought it out of their imagination. I will tell you, I spoke to her Monday, I made my regular call Monday, and she said this man came and said, "You are not in the grocery business, what are you going to do with anchovies?"

Q. What was the rest of the conversation?

A. Well, that is all.

Mr. Coblentz: That is all .

HENRY J. HAAF,

called as a witness by the defendant, sworn.

The Clerk: Will you state your name to the Court? [74]      A. Henry J. Haaf.

Mr. Beedy: Q. Mr. Haaf, you are one of the vice-presidents and directors of Coffin-Redington Co.?

A. That is correct.

Q. In charge of sales?

A. Drugs sold to drug stores, hospitals, government agencies, etc.

Q. How long have you been with the company?

A. 32 years.

Q. Mr. Haaf, when whisky became scarce toward the end of 1942 isn't it a fact that the drug division was required to establish a system of allocation?

A. That is right. In fact, the supply was so small that we had to work with, we went to considerable length to set up a system of allocation so as to effect a fair and equitable distribution of what we had to send out.

Q. That is to customers?

A. Yes, that was based on previous purchase records.

Q. Did the liquor division give you monthly a list of the articles that were available for distribution?      A. That is correct.

Q. Then what did you do with them?

A. Upon receipt of the list from Mr. Schloss I then looked it over and then returned it to John Sheehan, who took care of the allocation; in other words,

(Testimony of Henry J. Haaf.)

he had a set of books in which previous purchase records were listed, that is, speaking of drug accounts—there are some six hundred odd stores which had liquor licenses, and of those there were approximately 452 which had purchase records and we made an allotment to them. [75]

Q. In the drug division did salesmen call on them for purchases of liquor at that time?

A. Not at that time.

Q. How did you handle that?

A. The distribution of liquor?

Q. To drug stores.

A. The distribution of liquor to drug stores was handled entirely by the office.

Q. This system of salesmen not calling on them for liquor orders continued up until when?

A. August 1, 1944.

Q. Prior to that the work was done at the office, is that right?

A. Yes.

Q. And Mr. Sheehan is the one who sent them a list of the items that had been allocated to each?

A. Yes.

Q. Both liquor and drugs, isn't that right?

A. Not drugs.

Q. Just liquor?

A. That is right.

Q. What was the company's policy in relation to return of liquor that was sent to the drug companies?

A. At numerous sales meetings the men were told what our policy was, and were told the fact that the merchandise which we were sending out was sent out as a helpful gesture to our customers, with the full privilege of returning it if the merchandise was not



(Testimony of Henry J. Haaf.)

wanted, or if it was not something that they could use.

Q. Did you send out a bulletin to that effect?

A. I did.

Q. Have you a copy of that?

A. There are two, one dated June 22 and one dated August 4.

The Court: We will take a short recess.

(Recess.) [76]

Mr. Beedy: Q. Mr. Coblentz, I showed you this. This, if your Honor please, is interoffice and salesmen correspondence issued by Mr. Haaf to drug store representatives regarding liquor distribution to drug stores. It is headed, "Important instructions, read carefully." It is quite long, and the only part of it that I think is pertinent to what I am asking Mr. Haaf now is this paragraph on page 2, which reads as follows:

"We have never arbitrarily sent goods to customers and what goods have been sent in the past were always with the distinct understanding that it was on a voluntary basis and sent as a helpful gesture, and could be returned if desired."

Now, referring to that, Mr. Haaf, did you frequently or on occasions get returned items?

A. We did get some, yes; in fact, we have a number of credit memoranda here to support that.

Q. Where your drug store purchasers have returned liquor items of one kind and another?

A. That is correct.

(Testimony of Henry J. Haaf.)

Mr. Beedy: I suppose it won't be necessary to introduce these in evidence, because they are quite bulky, but we will have it marked for identification.

(The circular was marked Defendant's Exhibit A for Identification.)

Q. Did Mrs. Parker's Pharmacy in Berkeley, or Mrs. Parker's store, ever return any goods for credit?

A. She returned drugs, [77] but there is no record of liquor having been returned.

Q. But she returned drugs, you say, on occasions? A. Yes.

Q. In other words, you sent her goods, and if she did not want them she would return them?

A. That is right.

Q. That was true of liquor, was it?

A. That would include liquor.

Q. Have you ever received any complaints, either orally or written, from Mrs. Parker?

A. Never.

Q. As a matter of fact, Mr. Haaf, in the drug business competition is very keen, is it not?

A. It is very keen, indeed.

Q. It is important to maintain good will for the company, and you have endeavored to do that by giving the druggists who are on your customers' list all possible liquor that you could?

A. That is right.

Mr. Beedy: Mr. Coblentz, I showed you this.

Mr. Coblentz: Yes.

Mr. Beedy: Q. Mr. Haaf I show you a bulletin

(Testimony of Henry J. Haaf.)

addressed to the Drug Service Representatives, dated June 22, 1944. That is your signature, is it not?       A. That is correct.

Mr. Beedy: I ask that that be marked for identification.

The Court: It may be marked.

(The bulletin was marked Defendant's Exhibit B for Identification.)

Mr. Beedy: I call particular attention to the second paragraph on page 2 of that communication, which is as follows: [78]

“Tie-in Sales: We have heard rumors of numerous instances where tie-in sales have been practiced by those in the retail and wholesale liquor industry. We have never made any tie-in sales. Whatever merchandise we have sent to a customer has always been entirely upon a volunteer basis and entirely subject to his approval. We have never insisted that the customer buy one product in order to obtain the other. This is absolutely contrary to OPA regulations, both in respect to retail and wholesale sales and those practicing these tie-in sales are in violation of these governmental regulations. We repeat, we have always respected these rules and it is not our intention to do otherwise at any time.”

That, your Honor, is dated June 22, 1944, long before any controversy had arisen, or any examination made by the plaintiff, or anybody else. That is all.

(Testimony of Henry J. Haaf.)

Cross-Examination

Mr. Coblentz: I believe you testified that Exhibit A for Identification, the signature was yours on it?      A. Yes.

Q. Do you know what the distribution of that was?      A. To our seventeen drug salesmen.

Q. Did it go to any of the liquor salesmen?

A. No, it did not.

Mr. Coblentz: We would like to introduce this in evidence.

(Defendant's Exhibit A was received in evidence and marked Plaintiff's Exhibit 2.) [79]

PLAINTIFF'S EXHIBIT No. 2

Coffin-Redington Company

Inter-Office and Salesmen Correspondence

Aug. 4, 1944

To: Drug Service Representatives.

From: Mr. H. J. Haaf.

LIQUOR DISTRIBUTION TO DRUG STORES

Important Instructions

Read Carefully

Effective at once, with August allotments, the method of allotting Liquor to drug stores has been changed and will be put entirely in the hands of our drug service representatives. Therefore, it is necessary that you read carefully and observe closely the following instructions.



(Testimony of Henry J. Haaf.)

(1) **Liquor Price Books:** It is important for you to examine your Liquor Price Book and determine if it is up to date and complete. If it is not, be sure and requisition the necessary information at once so that you can authoritatively and correctly quote and sell Liquor.

(2) **Sales Record Liquor Purchases:** Liquor purchase records of each customer are being entered in your black sales book. These figures are entered in red ink so as to distinguish them from the drug purchases. It is important to remember that the base period upon which all quotas are figured by distillers are for the first nine months of 1942. Distillation of Whiskey stopped on October 8, 1942 and that was the date when the abnormal period began. Therefore, the figures before October 1st are the ones to consider. While obviously we want to take care of customers who always bought Liquor from us as they are rightfully entitled to it, we do want to keep in mind those accounts who will probably mean something to us in the future when these unusual times are passed.

(3) **Quotas:** From here on all Liquor will be an open item without any limits whatsoever as to quantity, except Whiskey, Gin, and Sweet Wines. Since these items will not be available in plentiful quantities, it will be necessary until conditions change to continue to allot these items in order to effect as fair and equitable distribution of the amounts we receive. Quotas will be given to you twice a month and in allotting these items you

(Testimony of Henry J. Haaf.)

should plan accordingly what customers should be cared for out of number one allotment and which ones out of number two, or both. It will be necessary for you to use the widest discretion and good judgment when dividing this merchandise because our records show we have done a pretty good job and unless it continues so it can result in a terrible headache for you and for us, too. **All Quotas Must Be Completely Withdrawn Within the Month in Which They Are Issued, Otherwise They Are Cancelled.** Orders should be sent to us as they are written and not held and sent to us in a group.

(4) **Writing of Liquor Orders:** All Liquor orders shall be written on liquor order forms and each and every order must be complete, including the Licensee's License Number. All orders must be written on liquor order forms.

(5) **Orders vs. Quotas:** All orders, when received, will be checked against quotas. If orders exceed quotas, same will be cancelled and returned to you.

(6) **Open Items:** Four pages of Open Liquor Items accompany this bulletin, and these are available without limit. The druggist should not make the same mistake as heretofore and think that it is only Bourbon and Gin that he can sell. To be in the liquor business and compete means that he should have on hand at all times a well-rounded and balanced stock. Therefore, you should check all of his stock when taking his orders. To simplify

(Testimony of Henry J. Haaf.)

your price book, and become thoroughly familiar with it, it might be well to immediately go through this and in ink mark "open" before each open item. Preserve these pages of open items as a permanent inventory. New sheets will be issued when, and if, necessary. Items appearing on the open list are items to be Sold and not sent to customers without consultation. We have never arbitrarily sent goods to customers and what goods have been sent in the past were always with the distinct understanding that it was on a voluntary basis and sent as a helpful gesture and could be returned if desired.

(7) Case Lots: While it will sometimes be necessary, because of limited quantities of quota items, to sell in less than case lots, this should be avoided wherever possible because the cost of handling less than full cases is extremely high.

(8) Distillers' Orders: With most every allocation there will come to you some Pink Order Slips, giving you customer's name and address and kind and quantity of Liquor the distillers have sent in to us to be shipped only to that customer and no one else. You Are to Write Up an Order for the Goods Named, Attaching the Pink Order Form to Your Order and Both of Which Must Be Returned to Us (Order and Pink Form Together). In order that you will have a complete knowledge of all Liquor going into your territory, these distiller's orders will be sent to you for attention. In some instances, you may consider the merchandise sent

(Testimony of Henry J. Haaf.)

as being sufficient and in others you may want to add some of your allotted or other goods to them. However, we believe it is well to check the stocks of each and every dealer, particularly when Whiskey is allotted, as it gives you an entree to his Liquor inventory and usually a very sizable order can be accumulated by this method. Another thing is that in a number of instances these orders are for less than case lots and you will probably want to build these up into larger orders, by adding other merchandise to this and making one shipment in all, thereby saving considerable expense. Remember, we do not prepay freight on liquor in less than case lots.

Comments: With the rapidly changing conditions in the Liquor Picture, it means that while certain items will necessarily continue to be rationed, on the other hand there will be a great many items that necessarily will have to be sold. The drug division must assume its fair share of responsibility in building up a predominant position of our Liquor Division.

All of you will recognize the fact that today the druggist is awakened to the possibilities that the sale of Liquor offers by correct merchandising. This is evidenced by the amount of display space that is now assigned to Liquor in the drug stores.

We believe this bulletin covers all questions but should you have any in mind, do not hesitate to ask them and do it promptly. We want this operation



(Testimony of Henry J. Haaf.)

to run smoothly and it should do so if you handle this correctly.

Yours very truly,

COFFIN-REDINGTON CO.

H. J. HAAF,

Vice-President in Charge of  
Sales.

HJH:HP

P. S. Your first allocation accompanies this bulletin. Your sales record book will be completed in a day or two and forwarded to you then. A supply of liquor orders forms has been sent you today.

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Mr. Coblentz: I will show you Defendant's Exhibit B for Identification, on which you say also appears your signature?

A. That is right.

Q. Do you know the distribution of that one?

A. The same as the other.

Mr. Coblentz: We would like to offer this in evidence.

The Court: It may be admitted and marked.

(Defendant's Exhibit B for Identification  
was marked Plaintiff's Exhibit 3 in evidence.)

(Testimony of Henry J. Haaf.)

PLAINTIFF'S EXHIBIT No. 3

Coffin-Redington Company

Inter-Office and Salesmen Correspondence

June 22, 1944

To: Drug Service Reps.

From: Mr. H. J. Haaf

LIQUOR

New Developments: You undoubtedly have read the news releases concerning the action of the Government in releasing all of the August Alcohol production for beverage purposes. It is estimated that this will total 25 to 30 million gallons of 190 proof Alcohol and when reduced to beverage spirits this will total approximately 50 million gallons.

There is no question but what this will relieve the tremendous pressure which has been caused by the shortage of all Liquors. No effect should be felt in this market until some time toward the end of September, except possibly for Gin which might become available earlier.

There will be more plentiful supplies of Blended Whiskies, Gin, and Cordials. The receipt of these supplies, of course, depends entirely upon the ability of the distillers to produce and bottle these products and while this may appear to be a very simple operation, the distillers, themselves, are confronted with numerous and tremendous problems. This is due to the fact that Bottles and Cartons are critical

(Testimony of Henry J. Haaf.)

and most difficult to obtain. Therefore, it will not be as easy as drawing water from a spigot as some people believe.

Prices: Now as to the question of price, all new merchandise will be sold under O.P.A. Regulations. It must be kept in mind that so far as Federal Taxes are concerned the same rates will apply to Beverage Alcohol, or products therefrom, as it does to Straight Whiskey, same proof. Some customers are of the opinion that Beverage Spirits take a lesser tax. This is not true. In fact, Blended Whiskey is actually taxed higher because it is assessed the 30c per gallon Rectifying Tax in addition to the usual Spirit Tax.

Inventories, Odd Items: Many customers are already asking how they can dispose of Rum, Imported Gin, Tiquella, Brandy, Vodka, etc., etc. "Can I cut prices?" and numerous other questions are being asked. It appears that some of the trade are becoming panicky. Right here it should be borne in mind that where it is thought necessary everyone has about sixty days to reduce inventories. Furthermore, while the demand for these items will unquestionably drop, it will not cease entirely. Furthermore, good brands of Brandy and Rum should not be sacrificed for this is good merchandise. Very little Brandy was made in California last year due to the high cost of grapes. It looks the same this year. Rum quotas for the last half of 1944 have been drastically reduced so that new Imports will be very small. The best Rum season is ahead of us

(Testimony of Henry J. Haaf.)

during the Fall months and the Holidays. It is our opinion that where a dealer has excessive stocks of these items that he should, however, get his house in order and immediately start reducing his inventory to normal amounts. He should do this in orderly fashion, but he should attempt to accomplish this within the next thirty or sixty days before products resulting from this Alcohol release become available.

**Liquor Fair Trade Prices Suspended:** Where dealers find it advisable to reduce stocks and are asking if it is permissible to reduce prices, it might be well to note that Liquor Fair Trade Prices have been suspended for the balance of the year by the State Board of Equalization. In other words, the retailer has a free hand in disposing of his merchandise at whatever prices he is inclined to sell no matter how low he goes. On the other hand, the O.P.A. Maximum Price Regulations remain in full effect and he must observe ceiling prices in all instances. He cannot sell demand goods above ceiling prices. Therefore, you will see that the maximum price limits remain in full effect and only the minimum have been removed.

**Return Goods:** Under the State Board of Equalization Ruling, which has been in effect for a number of years past, no goods are returnable for credit.

**Tie-In Sales:** We have heard rumors of numerous instances where tie-in sales have been practiced by those in the retail and wholesale liquor industry. We have never made any tie-in sales. Whatever



(Testimony of Henry J. Haaf.)

merchandise we have sent to a customer has always been entirely upon a volunteer basis and entirely subject to his approval. We have never insisted that the customer buy one product in order to obtain the other. This is absolutely contrary to O.P.A. Regulations, both in respect to retail and wholesale sales and those practicing these tie-in sales are in violation of these governmental regulations. We repeat, we have always respected these rules and it is not our intention to do otherwise at any time.

Yours very truly,

COFFIN-REDINGTON CO.

H. J. HAAF,

Vice-President in Charge of  
Sales.

HJH:HP

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Mr. Coblentz: I think that is all.

Mr. Beedy: That is all.

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JOHN SHEEHAN,

called as a witness by defendant; sworn.

The Clerk: Will you please state your name to the Court?

A. John Sheehan.

Mr. Beedy: Q. Mr. Sheehan, you are employed by Coffin-Redington & Co. are you?

A. That is right.

(Testimony of John Sheehan.)

Q. How long have you been so employed?

A. Four years.

Q. In what department are you employed?

A. At the present time in the sales department.

Q. Were you in the drug division before that?

A. Yes.

Q. In the period from February to July, 1944, where were you employed?

A. I was in the sales department, attached to allocating liquor. [80]

Q. To the drug stores?

A. To the drug stores.

Q. How did you do that?

A. By a process of allocation of the sales to the drug stores, themselves.

Q. Did you allocate on that basis to the customers of the drug division the whisky?

A. That is right.

Q. Who gave you the list of the available liquor merchandise?

A. Those lists were made by my predecessor to the time I took over the job.

Q. Mr. Haaf? A. Yes.

Q. Mr. Haaf would make them up and send them to you for the allocation? A. Yes.

Q. You would write up the orders on the basis of what he sent to you? A. Yes.

Q. Would you make notes on the accounts as to the likes and dislikes of particular customers?

A. I would.

Q. And in making up the orders would the likes and dislikes guide you? A. Yes.

(Testimony of John Sheehan.)

Q. For instance, if you had a note in there that somebody liked Marin Rum, or Baret Brandy, you made a note of that, did you? A. Yes.

Q. Would you try to allocate that item to him when you next made your allocation?

A. That is right.

Q. Now, taking the account of the West Berkeley Drug Store, that is Mrs. Parker, isn't it?

A. Yes.

Q. Is she an old customer of the company?

A. As far as I know. [81]

Q. She has been ever since you have been there?

A. That is right.

Q. And was she a valued customer?

A. I would say from looking at the purchases she was.

Q. The invoice written up March 2, 1944, shipped on March 8th, that was an allotment that you made, was it not? A. Yes.

Q. Do you recall that invoice at all, Mr. Sheehan? A. No, I do not.

Q. Now, it is claimed that she was required to buy Marin rum in order to obtain whisky, buy one-half case of Marin Rum Gold in order to obtain whisky, that is, half a case of Calvert Special, half a case of Old Fitz. Do you know what the facts were in regard to that?

A. That was all liquor that was sent on approval.

Q. She knew that she had that right, didn't she?

A. If she didn't want it she could always return it for credit.

(Testimony of John Sheehan.)

Q. All she had to do was notify the company and it would take it back? A. Yes.

Q. Take the invoice that was written up in May, May 25, May 17. Do those fall in the same category? A. Yes.

Q. Those were, among other things, for half a case of Nautical Rum and some tequila, as well as whisky? A. Yes.

Q. You made the allocation based on the available supply you had which could be given to her, is that it? A. That is right. [82]

Q. None of it ever came back?

A. Not to my knowledge, no.

Q. In June there is a copy of an invoice written up for her in which it was said that she was required to buy two cases of Marin Rum in order to get whisky, and that is true also in July. That was sent to her in the same manner as the previous shipment, was it not?

A. That is right, everything on approval.

Q. Did you ever telephone or write to Mrs. Parker or the West Berkeley Pharmacy, in regard to liquor orders?

A. Not that I can remember.

Q. Many druggists did telephone in, didn't they, about orders? A. Yes.

Q. But you don't recall that she ever did?

A. No.

Mr. Beedy: That is all.

Mr. Coblentz: No cross-examination.



## HERMAN DUFFY,

called as a witness by the defendant; sworn.

The Clerk: Q. Will you state your name to the Court?

A. Herman Duffy.

Mr. Beedy: Q. Are you employed by Coffin-Redington Company, Mr. Duffy? A. I am.

Q. How long have you been so employed?

A. 22 years.

Q. What are your duties?

A. Wholesale drug representative.

Q. Do you know Mrs. Parker, of the West Berkeley Pharmacy? A. I do. [83]

Q. Was it your business to call on her from time to time? A. Yes.

Q. Since when?

A. Since 1937, when she acquired the store.

Q. You have known her for a long time?

A. I have known her for seven years.

Q. You would see her often?

A. Twice a month.

Q. During the period in controversy in this case, that is, between February and July, 1944, did you call on her in the same way, that is, every two weeks? A. I did.

Q. You never took any orders for liquor, did you? A. No.

Q. That matter was handled from the office in the manner stated by Mr. Haaf and Mr. Sheehan, is that correct? A. Yes.

(Testimony of Herman Duffy.)

Q. Did she ever at any time make any complaint concerning the liquor that she received from the company?      A. No, never.

Q. You used to talk to her, did you not, about the drug business, and her business?

A. I did.

Q. Now, on August 1, 1944, there was a change made in the method of taking orders for liquor, wasn't there?      A. That is correct.

Q. Did you after that time discuss the liquor orders with her, I mean take orders for liquor from her?      A. I did.

Q. The company at that time had abandoned the policy of allocating liquor from the office?

A. That is correct.

Q. And were taking orders directly from the drug companies on open items?

A. Open stock items.

Q. She never at any time complained to you?

A. Never. [84]

Mr. Beedy: That is all.

Mr. Coblentz: No questions.

Mr. Beedy: That is the defendant's case, your Honor.

Mr. Coblentz: I would like to recall one of the defendant's witnesses to ask him one or two other questions, Mr. Guito.

PETER GUITO,

recalled for further cross-examination.

Mr. Coblentz: Q. Mr. Guito, you recall testifying earlier that on Monday you called at the Gelsi's and showed them the newspaper article?

A. What?

Q. I will show you a copy of a page of the "Chronicle" of February 26, 1945, which has an item up in the upper right-hand corner that has been marked. Is that the article that you showed her?

A. That is the article that she looked at.

Mr. Coblentz: I will offer this in evidence, if your Honor please.

Mr. Beedy: I see no particular reason for objecting to it, but I don't know what materiality it has in this case, Mr. Coblentz; why should we encumber the record with that?

Mr. Coblentz: At the opening of the case I made a statement that as a part of the scheme of the defendants in reaching witnesses that the defendants, here, had caused this item to be published in a newspaper, and the witness has testified what use he has made of it, and I think it has become material for [85] that reason.

Mr. Beedy: I do not think there is any evidence at all—it does not prove that the defendants in this case had anything to do with the publication of that; as a matter of fact, the defendant in this case very much resented the publication of that, because it holds them up to the public as being violators of the OPA regulations, something no old

(Testimony of Peter Guito.)

respected firm like this ever would want to get into the position of. As a matter of fact, they had nothing to do with that. They were sorry it was ever published. I don't think it proves or tends to prove any issue, whatever, that has been raised in this case.

The Court: I have not heard your objection yet.

Mr. Beedy: I object to it on that ground.

Mr. Coblentz: This witness testified that he showed this article to one of the witnesses who testified here this morning.

The Court: How would that bind Coffin-Redington & Company, a newspaper item?

Mr. Coblentz: It would not bind them, but still it would be in the record as to what he showed this witness.

The Court: State for the record the purpose of this offer.

Mr. Coblentz: The purpose of this offer is so that the record will show what the witness referred to when he said that he did show it to one of the witnesses who testified this morning.

The Court: The objection will be sustained.

Mr. Coblentz: That is all. The plaintiff rests.

Mr. Beedy: Defendant rests.

(Thereupon the case was submitted upon briefs to be filed.)

[Endorsed]: Filed Sept. 26, 1945. [87]



[Endorsed]: No. 11147. United States Circuit Court of Appeals for the Ninth Circuit. Coffin-Redington Company, a corporation, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed September 26, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11147

COFFIN REDINGTON COMPANY, a corporation,  
Appellant,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT WILL RELY; DESIGNA-  
TION OF RECORD ON APPEAL

To the Appellee above named, to his attorneys, and  
to the Clerk of the above entitled Court:

You and each of you are hereby notified that  
the appellant above named adopts, as its statement

of points upon which it intends to rely upon appeal, the statement of points heretofore filed with the Clerk of the United States District Court for the Northern District of California, Southern Division;

You and each of you are hereby further notified that the said appellant desires to have printed as the record on appeal in the above entitled Court, the entire record as certified by the Clerk of the United States District Court for the Northern District of California, Southern Division.

Dated at San Francisco, California, this 24th day of September, 1945.

THOMAS, BEEDY, NELSON &  
KING

LOUIS S. BEEDY

JOHN BENNETT KING

Attorneys for Appellant.

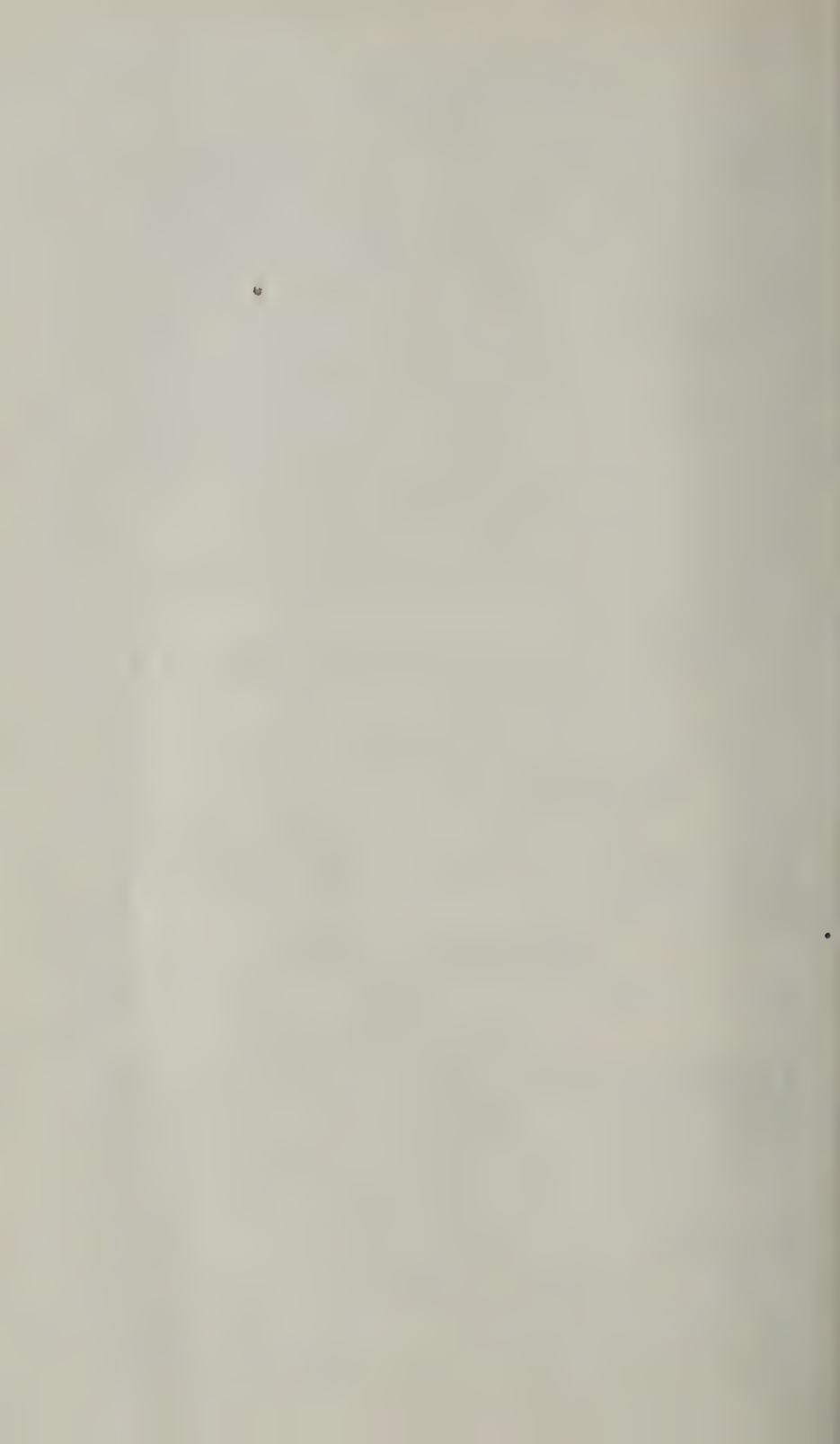
Received copy of the foregoing this 24th day of September, 1945.

HERBERT H. BENT

.....

Attorneys for Appellee.

[Endorsed]: Filed Sept. 26, 1945. Paul P. O'Brien, Clerk.



No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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COFFIN REDINGTON COMPANY

(a corporation),

*Appellant,*

VS.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

*Appellee.*

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Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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LOUIS S. BEEDY,

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FILED

NOV 30 1945

PAUL P. O'BRIEN,  
CLERK





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No. 11,147

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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COFFIN REDINGTON COMPANY

(a corporation),

*Appellant,*

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

**APPELLANT'S OPENING BRIEF.**

---

**JURISDICTIONAL STATEMENT.**

Chester Bowles, Administrator of the Office of Price Administration, hereinafter referred to as "Administrator", filed a complaint for injunction in the District Court of the United States, Northern District of California, Southern Division, against Coffin Redington Company, a California corporation, hereinafter referred to as "Company", on August 28, 1944 (R. 2). On May 10, 1945, after trial by the court, a jury having been waived, the lower court rendered a judgment for a permanent injunction against the Company

(R. 18). Within three months after the entry of the judgment and on July 12, 1945, the Company filed its notice of appeal with the District Court (R. 20). Thereafter and on September 26, 1945, pursuant to an order extending the time therefor (R. 20), the Company filed the record on appeal with this Court (R. 126).

The District Court had jurisdiction of the action by reason of the provisions of section 205(c) of the Emergency Price Control Act of 1942, as amended (50 Appendix, U.S.C.A. 925(c)). This Court has jurisdiction of this appeal by reason of the provisions of section 128 of the Judicial Code (28 U.S.C.A. 225). The pleadings necessary to show the existence of the jurisdiction are the complaint (R. 2) and answer (R. 4).

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#### **STATEMENT OF THE CASE.**

The complaint alleged, first, that the Company had sold distilled spirits at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (hereinafter referred to as "M.P.R. 445") and second, that the Company had sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold said whiskey at prices higher than the maximum prices permitted by the Regulation (R. 2). The answer denied the aforesaid allegations (R. 4).

A trial was had by the court without a jury. On April 19, 1945, the District Court ordered that an



injunction should issue against the Company (R. 12), and on May 10, 1945, filed findings of fact to the effect that the Company had, first, sold distilled spirits at prices higher than the maximum prices permitted by M.P.R. 445 and second, sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold whiskey at prices higher than the maximum prices permitted by M.P.R. 445 (R. 15). The lower court concluded, as a matter of law, that the Administrator was entitled to judgment that the Company be enjoined from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of the maximum established by M.P.R. 445 (R. 16).

On May 10, 1945, the District Court rendered judgment against the Company permanently enjoining it from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of the maximum permitted by M.P.R. 445 (R. 18). This appeal is taken from that judgment.

---

#### **SPECIFICATIONS OF ERROR.**

*First:* The District Court erred in finding that the allegations contained in paragraph 4 of the complaint were true, namely, that the Company had sold distilled spirits at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (R. 16),

for the reason that there was no evidence to support said finding.

*Second:* The District Court erred in finding that the allegations contained in paragraph 5 of the complaint were true, namely, that the Company had sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold whiskey at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (R. 16), for the reason that there was no evidence to support said finding.

*Third:* The District Court erred in concluding that the Company should be enjoined from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of those permitted by Maximum Price Regulation No. 445 (R. 16), for the reason that said conclusion of law was based upon findings of fact for which there was no evidence.

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## **ARGUMENT.**

### **SUMMARY.**

The Company contends that there was no evidence to prove that it had sold distilled spirits at prices higher than the maximum prices permitted by M.P.R. 445 (Specification 1); that there was no evidence to prove, first, that it had sold whiskey only on condition that the purchasers also buy other beverages and, second, that it thereby had sold whiskey at prices higher than the maximum prices permitted by M.P.R.

445 (Specification 2); that therefore, the conclusion of the District Court that the Company should be enjoined was erroneous (Specification 3); and that, therefore, the judgment of the District Court was likewise erroneous, and that judgment should have been given to the Company by reason of the Administrator's failure to prove his charges.

---

FIRST SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 4 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD DISTILLED SPIRITS AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

M.P.R. No. 445, issued pursuant to the Emergency Price Control Act of 1942 (50 Appendix, U.S.C.A. 925(c)), established maximum prices for distilled spirits.

Reference to the reporter's transcript in the lower court proceeding discloses that counsel for the Administrator stipulated in his opening statement that each separate item sold had been sold within its legal ceiling (R. 27). No evidence was thereafter introduced upon this issue. The court, in its order that an injunction should issue, recited that, "\* \* \* There is no question of any violation of price ceilings as to the individual commodities; \* \* \*" (R. 13).

It is clear from the foregoing that the Administrator abandoned his charge made in paragraph 4 of the complaint to the effect that the Company had sold dis-

tilled spirits at over-ceiling prices, and that the trial proceeded upon the sole charge contained in paragraph 5 of the complaint pertaining to alleged combination sales.

It follows, therefore, that there was no evidence to sustain the District Court's finding that the allegations contained in paragraph 4 of the complaint were true.

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**SECOND SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 5 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY OTHER BEVERAGES AND THEREBY HAD SOLD WHISKEY AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.**

Section 7.8 (b) of M.P.R. 445 prohibited the selling of distilled spirits by means of tying agreements or combination sales if the effect of same would be a sale of said distilled spirits above their legal ceilings (R. 13).

The Administrator complained of certain sales by the Company to four retailers occurring over the six-month period extending from February through July of 1944. It is our purpose to demonstrate in the following pages that *all* evidence produced at the trial, including the testimony of the four retailers in question, pointed unerringly to the conclusions, first, that the Company, in view of its prominent position in the mercantile life of the Bay Area, in view of its organi-



zational emphasis and dependency upon drug and pharmaceutical distribution as compared with liquor distribution, and in view of its host of competitors in the wholesale drug and liquor business, could not have countenanced, permitted, encouraged or participated in the alleged practice of combination sales and, second, that the Company did not in fact countenance, permit, encourage or participate in such a practice during the aforementioned period or at any other time.

Mr. Sherwood Coffin, Vice-President and General Manager, testified that the Company's business was that of wholesale drug and liquor distribution, and that the Company and its predecessors had been engaged in business in San Francisco for the last ninety-five years (R. 78). In addition to sales to the usual retail outlets, the Company served hospitals and various governmental agencies (R. 79, 104). In 1944, its gross sales exceeded nine million dollars (R. 78).

In its internal structure, the Company maintained a Drug Division and a Liquor Division (R. 79). Eighty per cent of its business was attributable to the Drug Division (R. 79). The profit ratio on drug sales was higher than that on liquor sales (R. 81). The Company was under no economic pressure to sell its available liquor supplies; it was not dependent upon the Liquor Division for its continued existence. Further, the Company, perhaps more than the other wholesale liquor distributors, could not have risked alienating its customers by questionable liquor-sales tactics, for it would thereby have jeopardized many of its sustaining drug accounts.



The liquor business was the subject of active competition. In the Bay Area during 1943 and 1944, there were approximately thirty wholesale liquor distributors offering the same lines of liquor merchandise (R. 84). Under those conditions, no retailer could actually have been forced to buy anything which he did not want; his alternative would simply have been to transfer his trade to the reputable concerns.

Illustrative of the importance which the Company attached to the maintenance of its reputation and the retention of its customers was the publication and distribution of an inter-office communication (*plaintiff's* Exhibit No. 3) by Mr. Henry J. Haaf, a Director and Vice-President. This document was dated June 22, 1944, and was issued at a time when no controversy had yet arisen (the complaint was not filed until August 28, 1944). Mr. Haaf's communication disclosed that it never had been and was not then the Company's policy to engage in combination liquor sales, regardless of the actions of competitors (R. 117-18).

In the latter part of 1942, whiskey commenced to become scarce (R. 82). In fairness to its 1700 liquor customers (R. 82-3), the Company established a plan for allocating its available supplies (R. 82, 104) on the basis of customers' dollar-purchases during the first eight months of 1942, considered to be the last normal sales period (R. 82, 84). The allocation clerk in the office of the Drug Division used this standard in filling liquor orders for drug customers (R. 104-5, 119); the salesmen in the Liquor Division were likewise guided

in computing the fair share of any of their purchasers (R. 83).

Prior to the institution of this action, the Company made all of its records available to investigators from the Office of Price Administration. From those records, numbering in the thousands, the investigators selected certain ones upon which the complaint was based. The evidence relating to those selected records is best reviewed in connection with the cases of the four retailers who allegedly were imposed upon: Mattie Parker, Nat Lasser, Edith Gelsi and A. Ferroni.

**1. The alleged case of "Mattie Parker v. Coffin Redington Company".**

Mattie Parker, called as a witness by the Administrator, testified that she was the owner and operator of the West Berkeley Pharmacy in Berkeley, California (R. 29), that she had purchased both drugs and liquor from the Company during the eight and one-half years in which she had been in business (R. 29, 34).

She expressed her awareness of the whiskey shortage after 1942 and her realization of the fact that, in order to retain her retail liquor trade, she would have to make available to her customers types of alcoholic beverage other than whiskey (R. 35). It was for this reason that she willingly accepted every type of liquor which could possibly be allocated to her (R. 30-1, 35).

Mrs. Parker testified that she knew that she had the privilege of returning any item or items of liquor and/or drugs which she did not want (R. 34). In proof of this knowledge, she stated that, from time to

time, she had returned various drugs (R. 34). Her statement that she had never returned any items of liquor—that she had kept all that she could obtain (R. 36), was further evidence of her need and desire for all types of alcoholic beverage.

With particular reference to her purchase of whiskey and brandy on July 25, 1944, she testified that she had wanted both items (R. 30). Concerning other purchases of whiskey, rum and tequila on March 2, 1944, May 25, 1944 and June 21, 1944, she stated that she had not refused the rum (R. 30) and that she had since ordered additional tequila (R. 31).

Mr. Haaf, responsible for the Company's distribution of drugs and liquors to drugstores, testified that during the period covered by the above mentioned purchases, salesmen had not called upon such accounts to obtain orders for liquor, but that liquor distribution had been effected directly from the office of the Drug Division by John Sheehan, the allocation clerk (R. 105). Mr. Sheehan testified that he customarily had written up liquor orders for the various druggists from lists prepared by Mr. Haaf, but that he also had taken into consideration any known likes or dislikes of particular customers (R. 119); that he had attempted to send them the items for which they had indicated a preference in the past (R. 120); that Mrs. Parker had been a valued customer (R. 120); and that all or any of the items which she had received on the previously mentioned March, May, June and July dates could have been returned for credit if she had not wanted them or any one thereof (R. 120-121). Mr. Haaf also

testified as to Mrs. Parker's privilege of returning any items not needed or wanted (R. 107) and that, although Mrs. Parker had never availed herself of that privilege as to liquor (R. 107), other druggists had done so (R. 106).

Herman Duffy, the salesman who had called upon Mrs. Parker for the last seven years for drug orders, testified that at no time had she ever made any complaint to him concerning liquor which she had received from the Company (R. 123). Mr. Haaf confirmed this by stating that he had never received any complaints, oral or written, from Mrs. Parker (R. 107).

The foregoing manifests the objective, mechanical process employed by the Drug Division in parcelling out its meager supply of liquor to its drugstore customers, a process designed, not so much to return a profit on liquor sales, but to enable the druggists to retain their liquor customers and to enable the Drug Division to retain those druggists as purchasers of pharmaceutical preparations. The gesture was intended as a helpful one (R. 105) and as a deterrent to the druggist to shift his drug business to competitors (R. 107).

We submit that the alleged case of "Mattie Parker v. Coffin Redington Company" was without merit; that there was no evidence of any nature tending to prove that Mrs. Parker was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.



2. The alleged case of "Nat Lasser v. Coffin Redington Company".

Nat Lasser, called as a witness by the Administrator, testified that he was the Manager of Carlo's Wine & Liquor Store at 2080 Chestnut Street, San Francisco (R. 53), and that he had done business with the Company for the past two and one-half years (R. 57).

The witness described the customary way in which he had ordered his merchandise from the Company's salesman: the latter would make known to Mr. Lasser the merchandise available for sale; Mr. Lasser would make his selection; the salesman, in Mr. Lasser's presence, would write up the order, after which Mr. Lasser would sign it (R. 51). This purchaser testified that he had never received any merchandise which he had not ordered (R. 54).

Mr. Lasser recalled having made a purchase from the Company in June of 1944 consisting of whiskies, brandy and rum (R. 54). He stated that he had ordered all of those items (R. 55), that he had not been required to buy the rum (R. 60), and that since that time he had ordered a great many more cases of the same kind of rum, all of which had been sold (R. 59). As a matter of fact, with reference to this particular purchase of rum (two cases), Mr. Lasser testified that he had originally ordered three cases, that he had telephoned Morris Levy, the salesman, the next day and informed him that another distributor had sent him a case of rum and that he would only need two cases from the Company, and that the salesman had thereupon reduced the order to two cases (R. 60).



Mr. Levy confirmed these statements (R. 97-8). This may be cited as a typical example of the efforts of the salesmen to preserve the good will of their customers.

Mr. Lasser also recalled having given an order to Mr. Levy in February of 1944 (R. 58). This order had consisted of but a *single* item, one case of Olympic filets of anchovies (R. 58). The witness stated that he had ordered the anchovies (R. 55), that he had signed his name to the order (R. 57), that the anchovies had been merchantable goods, salable in the same manner as olives, cherries and other delicacies which naturally accompanied liquor (R. 59), and that he had sold all but the one can which the investigator from the Office of Price Administration had seized and which Mr. Lasser wanted returned (R. 55). He concluded with the statement that he had never had any complaint about the way the Company had done business (R. 60). Entirely aside from this positive evidence that Mr. Lasser had not been compelled to purchase anchovies in order to obtain other merchandise, it is significant that no other items had been ordered or received by Mr. Lasser with the anchovy purchase; a combination sale, by virtue of its manifold nature, would have been a legal impossibility.

Mr. Levy testified that at no time had he ever conditioned a sale of whiskey upon a sale of other merchandise (R. 97).

We submit that there was no evidence of any nature tending to prove that Nat Lasser was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

3. The alleged case of "Edith Gelsi v. Coffin Redington Company".

Edith Gelsi, called as a witness by the Administrator, testified that she owned and operated a tavern in Daly City (R. 47); that she had been in business for the last nine years (R. 47) and had been a customer of the Company during that entire period (R. 50).

Mrs. Gelsi stated that the Company had always given her satisfactory service and that it had never forced her to take anything (R. 51).

With particular reference to a purchase in June of 1944 (R. 47), consisting of whiskey, sloe gin, rum, brandy and anchovies (R. 52), she stated that she had voluntarily purchased all of those items (R. 51), that she had never objected to or returned any of them (R. 53), and that she had been selling such merchandise ever since she had been in business (R. 53). Concerning the anchovies in particular, Mrs. Gelsi testified that she had wanted them, that her husband had signed the order, that she and her husband had used them, and that only two small cans (2 oz. size) were left (R. 52). Mr. Edwin Schloss, Manager of the Liquor Division, testified that the anchovies had been imported from Portugal in pure olive oil, that they had been difficult to obtain and had been restricted by the Company (R. 85).

Peter Guito, salesman, testified that his method of selling had been to inform Mr. Gelsi of his available supply and to sell him the items which the buyer had wanted (R. 101). There had been times when Mr. Gelsi had asked for certain items which had not been

available, and the salesman had made notations of the desired merchandise and later, when it had become available, had so advised Mr. Gelsi (R. 101).

With reference to the sale made in June of 1944, the salesman stated that Mr. Gelsi had been trying to obtain the Bacardi rum for several months prior to the date of sale (R. 101), and that he had been pleased to receive the rum when it had finally been sold and delivered to him (R. 102). Mr. Gelsi had good reason to be pleased: all rum had been difficult to obtain, particularly Bacardi rum (R. 87).

Mr. Guito, in answer to the direct question, "Did you ever sell to Mr. Gelsi or Mrs. Gelsi whiskey on condition that they would purchase rum, tequila, gin or any of the other items?", responded with a categorical, "No" (R. 102).

We submit that there was no evidence of any nature tending to prove that Edith Gelsi or her husband was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

#### **4. The alleged case of "A. Ferroni v. Coffin Redington Company".**

Mr. Ferroni, called as a witness by the Administrator, testified that he was the operator of a restaurant known as "Transport Cafe", located at 1901 Union Street, San Francisco, and that he had been in business for the last fourteen years (R. 36).

The witness stated that he had ordered whiskey from the Company within the last year (R. 37). He denied

that he had ever been told that he could not buy whiskey without also buying other liquor (R. 37). He testified affirmatively that the Company's salesman had not required him to buy anything: "I will tell you, they don't force me to buy anything" (R. 38); "\* \* \* it is a fact that they never forced me to buy something I did not need; for the last three years I didn't do that at any time" (R. 38-9).

Concerning purchases which he had made on May 27 and July 11, 1944, in response to a question by counsel for plaintiff as to whether or not he had ordered the rum, he stated that he had (R. 39-40). With reference to purchases made on June 29, 1944, he likewise testified that he had ordered the rum and sloe gin (R. 40). Concerning purchases made on June 14 and 27, 1944, he also testified that he had ordered the brandy and anisette (R. 40).

It developed that Mr. Ferroni customarily had done a large neighborhood business in coffee royals (R. 43, 95), that is, coffee containing whiskey, rum, brandy or anisette; that sometimes forty or fifty customers a night had entered his restaurant and had ordered nothing but coffee royals (R. 43); that he had used brandy (R. 43), tequila (R. 43) or anisette (R. 40) in filling their orders.

Mr. Ferroni testified that he had signed all of the orders mentioned above (R. 41) and that he had received and used in his business all of the items so ordered (R. 42).

The witness stated that at different times around the middle of 1944, he had given orders for whiskey



alone (R. 43); that, on August 9, 1944, the Company had sold him fifteen cases of whiskey and that no other items of merchandise had been included in the order (R. 43-4, 46); that there had been other occasions on which the Company had sold him only whiskey and all that he had wanted of it (R. 44).

Mr. Morris Levy, the salesman who regularly had called upon Mr. Ferroni for orders, described in detail his exact method of taking those orders: he would suggest various articles which he had for sale for the particular month, including whiskey, and would ask him what he could use; the buyer would state his needs, the salesman would make up the order in his presence, and the buyer would sign it (R. 95).

Mr. Levy further testified that, during the period from February to July, 1944, whiskey had been very scarce (R. 95) and that Mr. Ferroni had quite willingly purchased articles other than whiskey, such as rum, brandy and tequila, due to his large trade in coffee royals, particularly with the foreign element; that Mr. Ferroni had sold those articles daily and that he had repeated the orders for them from time to time (R. 96). Mr. Levy recalled one instance in which the purchaser had wanted brandy and anisette (which he had not been able to obtain for a long time)—wanted them because his Italian customers had liked and used them in quantity (R. 96).

In answer to the question, "Did you at any time, Mr. Levy, ever require Mr. Ferroni to purchase any articles in order to get whiskey?", Mr. Levy replied, "I



never have. Having been in the retail business myself, for better than 25 years, I always made it a policy to treat my customers the same as I would like to be treated, myself, and not force them at any time, to take anything. \* \* \*'' (R. 96).

We submit that there was no evidence of any nature tending to prove that A. Ferroni was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

All of the evidence produced at the trial has now been reviewed in the foregoing pages. That evidence shows that during the war-torn years of 1942, 1943 and 1944, the normal equation of supply and demand in the liquor industry became and remained unbalanced. Military requirements for alcohol created severe shortages in consumer intoxicants. Public insistence upon stimulants, the result of mental and physical pressures engendered by extended work weeks coupled with abundant purchasing power, soared to unprecedented heights.

It was the retailer who first felt the effects of the disturbed economic equilibrium. He was called upon to satisfy the demands of a million voices for liquor, whether it be scotch, bourbon, rye, brandy, gin, rum, tequila or anisette. Whiskey, of course, was the most sought-after variety, but when the whiskey supplies were exhausted, anything else likely to produce the same results was acceptable.

Repercussions commenced to be felt in the wholesale field. Guided by the same motive as the Office of Price Administration in rationing the food supply of America among the countries of the world, namely, to assure a little of everything to everyone, the wholesalers buckled down to the task of allocating their fast-diminishing stocks of liquor to all of their retailers. Had it not been for this equitable procedure, thousands of liquor retailers would have been compelled to close their doors (R. 90).

Perhaps there may be some who will say that, under the conditions described, competition among wholesalers could never have existed and that, therefore, such competition could have exercised no effect upon methods of sale. This, however, would be an erroneous deduction of logic as well as a misstatement of actual conditions. Even among wholesalers who dealt solely in liquor, there was the ever-present consideration in the minds of management that normal times would eventually return, that when they did, the wholesaler would again be required to *sell* his whiskey, his rum, and his innumerable other liquor products, and that the wholesaler who had disadvantaged his retailers would lose them to others who had dealt fairly. Not only was the Company conscious of this future threat to its successful operations, but it was very much aware of the existing, unabated competition in the drug business (R. 107). Without sources of distribution for its tremendous supplies of drugs, the Company would have little relative reason for continuing in business. Competition still thrived in the wholesale

drug and liquor business in the years 1942 through 1944, and this competition was sufficient to deter thinking wholesalers from disregarding it in formulating their sales plans.

As would be expected of a concern which had conducted itself successfully and with propriety in San Francisco for almost a century and which desired to continue indefinitely in the same manner, the Company operated upon the studied policy of attempting to supply all reasonable demands. This required the allocation of all items of merchandise sold to the testifying retailers (R. 86). Many sales of whiskey alone were made during the period in question (February through July, 1944) (R. 89).

The retailers selected by the Administrator to prove the charges made in paragraph 5 of his complaint numbered four. If he had chosen to call the other 1696 retailers serviced by the Company, the evidence would have been the same, but it would have been merely cumulative. Those retailers who took the witness stand testified to the truth: when they purchased their merchandise from the Company, they were not forced to buy one item in order to obtain another; they knew that they could return all items or any one thereof, just as they could have done in normal times and just as some of them did do in 1944 (R. 85-6); they knew that they could dispose of everything they bought; they *did* dispose of everything they bought.

We feel that it is highly significant that much of the testimony negating the alleged combination sales was

elicited by plaintiff from his own witnesses, who so testified on direct examination. Additional corroborative evidence was furnished by the Company's witnesses.

A decision upon the same law and substantially the same facts as the case at bar may be found in *Bowles v. Stafford*, 56 F. Supp. 976 (District Court, Louisiana, September 25, 1944). The court there denied the preliminary injunction sought by the Price Administrator. For this Court's ready reference, the opinion in that case has been printed in the Appendix.

We rest with the statement that there was no evidence to prove the existence of a single combination sale, and that there was abundant evidence to prove the *non-existence* of such a sale.

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**THIRD SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMPANY SHOULD BE ENJOINED FROM SELLING WHISKEY TO PURCHASERS ONLY ON CONDITION THAT THEY ALSO BUY OTHER BEVERAGES AND FROM SELLING WHISKEY OR OTHER DISTILLED SPIRITS AND WINES AT PRICES IN EXCESS OF THOSE PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.**

If this Court shall determine that the Company is correct in its position with reference to its First and Second Specifications of Error, it will follow that this Third Specification is also well taken. Conclusions of law fall when the supporting findings of fact are reversed:

*Schenkel v. Schenkel*, 238 App. Div. 878, 263 N.Y.S. 16.



Conclusions of law must find support in and arise out of findings of fact:

*French v. Edwards*, 21 Wall. 147, 22 L. Ed. 534;  
*Corpus Juris*, Trial, Section 1101.

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#### CONCLUSION.

Under the pleadings, the burden of proof was upon the Administrator to prove the violations alleged in paragraphs 4 and 5 of the complaint:

*Bowles v. Cohn*, 57 F. Supp. 306 at 307.

The entire record of the proceedings in the District Court, which includes every shred of evidence which the Administrator was able to produce, is now before this Court. Upon the basis of that record, we contend that the Administrator has failed, completely and without exception, to maintain his burden of proof.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact of the District Court may be set aside by this Court if they are clearly erroneous. The rule plainly contemplates a review by this Court of the sufficiency of the evidence to sustain the findings:

*State Farm Mut. Automobile Ins. Co. v. Bonnacci*, 111 Fed. (2d) 412 at 415.

This Court is not limited to the mere question whether there is any substantial evidence to support the findings, but such findings may be set aside if they are against the clear weight of the evidence:

*State Farm Mut. Automobile Ins. Co. v. Bonnacci*, *supra*;



*Aetna Life Ins. Co. v. Kepler*, 116 Fed. (2d)  
1 at 4, 5.

If a finding of fact is against the clear weight of the evidence, even though it is supported by some evidence, it is clearly erroneous:

*Fleming v. Palmer*, 123 Fed. (2d) 749 at 751;  
*Shultz v. Manufacturers & Traders Trust Co.*,  
128 Fed. (2d) 889 at 900.

The Company is challenging the District Court's findings of fact as to the verity of the allegations contained in paragraphs 4 and 5 of the complaint. It believes and alleges, not only that each challenged finding was against the clear weight of the evidence, but that neither of said findings was supported by *any* evidence.

An incorrect conclusion of law qualifies as a "clearly erroneous" finding which the reviewing court may correct under Rule 52 (a):

*Kuhn v. Princess Lida of Thurn & Taxis*, 119  
Fed. (2d) 704 at 706.

The Company respectfully asks this Court to reverse the judgment of the District Court and to render final judgment in its favor.

Dated, San Francisco, California,  
November 30, 1945.

LOUIS S. BEEDY,  
JOHN BENNETT KING,  
THOMAS, BEEDY, NELSON & KING,  
*Attorneys for Appellant.*

(Appendix Follows.)









## Appendix

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The opinion in *Bowles v. Stafford*, 56 F. Supp. 976 (District Court, Louisiana, September 25, 1944), follows:

“The Price Administrator seeks to enjoin preliminarily the defendant ‘from directly or indirectly violating the terms and provisions of Maximum Price Regulation No. 445’.

“The complaint alleges three instances (counts) when the defendants sold commodities ‘through tying-in agreements or combination sales’. The purchasers of goods in each of the counts were present in court and testified. All of the witnesses in this case for plaintiff and defendant, except one for the defendant, are persons known well and intimately by the court for many years.

“The first theory of the government in all of the three sales is, for instance in count 1, that because on one day and listed in one invoice there was a sale of two cases of rum, two cases of gin (fifths), and eight cases of gin (pints), the purchase of the rum was ‘required’ by the seller and that, circumstantially at least, there is evidence of a tying-in sale.

“In the second count, the same circumstantial inference is suggested when two cases of rum appear similarly with five cases of gin at one and the same time, to be followed later by another invoice, supposedly connected (the two invoices being one transaction), showing the sale of two cases of gin within thirty cases of whiskey, the tying-in being allegedly the two cases of Pete Hagen gin and the two cases of rum being sold as a condition to get

the five cases of Private Stock gin and the thirty cases of whiskey.

“In the third count, there is sold by the defendant and placed on one invoice one case (fifths) of Galgo rum and two cases (fifths) of whiskey, and four cases (half-pints) of Ron Donna rum, and that the case of rum was a condition for the sale of the other two items on the invoice is alleged, and that this was a tying-in requirement prohibited by law. The buyer testified in this case, and said there was absolutely no requirement by the seller and that the purchase was made by him voluntarily, under no suasion or compulsion.

“The presumption prevailing throughout this case is that whiskey, straight or blended, is a best seller, that rum is not a good seller, and that gin and wine are somewhat in-between.

“It developed during the course of the trial, and it was accepted mutually as a fact that there is not enough whiskey to satisfy the desire of the public for intoxicants; that beyond the whiskey there is general demand and sale of rum, wine, liqueurs, etc.

“We know the defendant company and its immediate predecessors have been engaged in the liquor business for nearly fifty years, and, though it be engaged in a business which is heavily taxed and highly policed, we have never known of a complaint filed against it in court.

“The defendant company’s contention is that being engaged in the general liquor business and having a full and complete stock, through its salesmen, following well-established American business methods, it tries to sell any and all types

of its stock; that long before the establishment of the O.P.A. it had weekly meetings of its salesmen for the discussion of what was in stock and what should and could be legitimately offered the buying public, etc.; that it has never made a condition to a single one of its clients that in order to get a certain quantity of whiskey there had to be bought a certain quantity of wine or rum or any other type of intoxicant.

“The plaintiff offered evidence of other sales by the defendant, in addition to the sales included in the three counts, to show general intent or conduct. The court permitted this evidence over objection of defendant because the main evidence was equivocal, in that, for instance, where there appears a sale of rum and whiskey on the same invoice and on the same date, the government alleges the rum had to be taken by the buyer in order to get the whiskey, while on the other hand the defendant says it is merely a sale of rum and whiskey, one item sold independently of the other, and that it is a sale in the ordinary run of its business, and that there is nothing in the O.P.A. regulations that prevents a buyer from buying two items at one and the same time. There were two witnesses of this type and one testified that he is a very busy man, having a drug store, furniture store, saloon, etc., to manage, that what would happen was that the defendant’s representative would walk into his place and he (the witness) would go to him and say, ‘what do you have today?’ the other would mention two or three items and that he would then take it or not take it. Generally, since business was good, he would say, ‘All right, send me the goods. How much do I

owe you for the last sale?' He would give his check and that was the end of the whole interview. This witness ended his testimony by saying that at no time did it ever arise that he was refused the sale of whiskey when he did not take some other item, and particularly stated that he had never been required, induced or compelled to make any tying-in purchase. The other witness, giving evidence of the same character, absolutely failed to help plaintiff's case. We are satisfied that when he said he had been promised ten cases of whiskey if he bought ten cases of wine, he was mistaken. An invoice establishes a sale of ten cases of wine and one case of whiskey. The witness claims that defendant subsequently failed to deliver the nine cases of whiskey. Irrefutable proof comes from the salesman of defendant that this witness of plaintiff was plainly mistaken. We believe the salesman of defendant.

"The manager of the buying store in counts 1 and 2 testified in person. He frankly stated that the quantity of whiskey to be had was limited, and had to be rationed, that is, apportioned by the wholesaler; that every liquor dealer knows that; that he was never compelled directly or indirectly to make a purchase, one item being included because of another; that he carried a general store of intoxicating liquors; that in one of the counts the first sale made was for only twenty cases of whiskey, but that later he telephoned and had ten more cases added; that under the general conditions of rationing, particularly as to whiskey, and the demand for it exceeding the supply, dealers had to carry many other items of intoxicating liquor, which he always tried to push because he



was never in any trouble in moving his whiskey; that the sale of whiskey alone could not keep him in business, either himself, the dealer, or the wholesaler; that the defendant was kind enough at one time in the past, and this was quite before the injunction suit of the plaintiff, to accept the return of some \$1800 to \$1900 worth of various goods in which he had overstocked.

“The manager of the liquor business of the defendant gave a full and detailed explanation of what was done in the regulation of its annual two-million-dollar liquor business. It apportioned its whiskey as received to its former buyers in the ratio of previous purchases, irrespective of whether or not anything else was bought. He explained that the defendant had always sold for many years other items and continued to do so since O.P.A., but that there were never any tying-in sales suggested, sought or planned; in fact, that they were particularly prohibited by the management.

“Two salesmen of the defendant testified in detail about the sales in the three counts. (There is a fourth count in the complaint, but, because the main witness as to it is now in the armed services and not available, this charge was not pressed.) From their testimony we believe no requirement, suasive or compulsory, was exercised in the making of the specific sales. Generally, they testified that they would reasonably try to sell all they could, yet were always mindful that a customer is never retained if you sell to him a shelf-warmer, or overstock him on an item.



“It has been proved in the case that there are a number of local wholesalers, and even since the O.P.A. regulations there is competition among them, all having salesmen seeking business. As a consequence, there could be no real or continued holding up or compulsion by any wholesaler in the establishment of what is known as tying-in sales. If the rum is bought in order to get some whiskey, as a practical necessity, the price of the whiskey when sold would have to include also the cost of the rum. The proof has prevailed in this case—the court establishing it from the first witness and subsequently the plaintiff staying away from further proof, that neither the whiskey nor the rum was sold above the ceiling price.

“The circumstance that the ratio of supposedly undesired items to the much-sought whiskey or beer is always very low tends to prove no tying-in requirement, but more likely shows but the natural, uninfluenced, relation of sales between the two.

“Another strong point with the court which favors the defendant is that it filed and placed of record all of the business it had done with the two firms involved in the three counts, for the period of January until now, and an examination of these invoices shows a great variety of items, singly and joined.

“Additionally, many of the invoices prove many sales were solely of much-sought articles, as follows: \* \* \* (Here follows lengthy enumeration of items listed on the invoices.)

“We have now covered the total business from January to date between the defendant and Rey-

naud and Moreau, one of the dealers concerned in one of the counts, the third one. Our conclusion from these facts, showing such a variety of purchases, and in so many instances purchases of much-sought whiskey solely, is that there is no preponderance of proof to support the third count.

“We have made an examination similarly of all the sales as to the other dealer concerned in counts 1 and 2, finding that they are about equal in number and that the same factual situation exists. Consequently, we reach the same conclusion.

“We have determined that in the sole decision cited to us, *United States v. Armour & Co., D.C., 50 F.Supp. 347*, the court there mainly determined that the indictment filed against the defendant, containing the exact language of the law and giving the fact that as a condition of the sale of butter eggs had to be bought, legally defined a crime. No actual trial is yet reached in the cited case; we are satisfied that in the instant case the complaint properly and legally sets out the grounds for the issuance of a preliminary injunction. We do not believe that the facts in the instant case preponderate in favor of the plaintiff to warrant us in granting the issuance of the writ sought.

“We recognize, too, that general interpretations by the Administrator have great force and in the decision of this case we have recognized and given full weight to the interpretation of tying agreements (a) and (b). General Application, O.P.A. Service 2-10, page 2-812.

“This type of case is difficult of proof by the Administrator. No ceiling price is violated in this

case. The violation of a ceiling price case is immediately determinable—one or two reliable witnesses give proof as to the price actually paid and if that price be above the ceiling price, the conviction necessarily follows. With the present case the proof is much the more difficult. What would be a normal business is all we find here. With the facts before us, to characterize the three complaints as violations of the law by the defendant would do violence to our judicial conscience.

“It is not only that the evidence does not preponderate in favor of the plaintiff, but there is a want of sufficient proof to establish that degree of legal certainty necessary for judgment.

“The preliminary injunction will not be granted. Timely judgment will be signed.”

No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

COFFIN REDINGTON COMPANY

(a corporation),

*Appellant,*

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

---

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FILED

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PAUL P. O'BRIEN,

CLERK





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No. 11,147

IN THE

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COFFIN REDINGTON COMPANY

(a corporation),

*Appellant,*

vs.

CHESTER BOWLES, Administrator, Office of  
Price Administration,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

**BRIEF FOR APPELLEE.**

---

**JURISDICTION.**

Appellee adopts the jurisdictional statement contained in the appellant's opening brief.

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**STATUTES AND REGULATIONS INVOLVED.**

The action involves Maximum Price Regulation No. 445, as amended and revised (9 F.R. 4687), hereinafter called "the Regulation", which establishes maximum prices for distilled spirits and wines, and particularly Section 7.8(b) thereof entitled "Evasion", reading as follows:



“(b) Evasion. The provisions of this regulation shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt, of or relating to any commodity, or service covered by this regulation, alone or in conjunction with any other commodity or service or by way of finder’s fees, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by *tying agreement, combination sales*, or trade understanding; by requiring the buyer to purchase packaged distilled spirits or wine on a per drink basis; or in any other way. The specific enumeration of acts constituting evasion is illustrative but not exclusive.” (Emphasis supplied.)

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### STATEMENT OF THE CASE.

This action was instituted by the Price Administrator to enjoin the defendant from engaging in certain unlawful practices in connection with sales of whiskey at wholesale. The complaint alleged (1) that defendant sold distilled spirits at prices higher than permitted by the regulation, and (2) that defendant sold imported whiskey or domestic whiskey only on condition that the purchaser accept delivery of, and pay for, other beverages, such as domestic rum, gin, tequila and vodka (R. 3).

It was stipulated between the parties at the trial that although the total price charged for the whiskey plus the other commodities exceeded the maximum price permissible for the whiskey alone, none of the

individual commodities were sold at a price in excess of ceiling price for each such commodity (R. 26-27). Upon hearing the testimony of the liquor retailers who purchased the commodities from the defendant, the testimony of an investigator for the Office of Price Administration, and the testimony offered by the defendant, and after the submission of briefs by both sides the Court granted an injunction which prohibited the defendant from evading the regulation, directly or indirectly, by reason of tying agreements or combination sales of liquor and also from selling liquor at prices in excess of those permitted by the regulation (R. 19).

The principal questions presented by this appeal are (1) whether the evidence is sufficient to sustain the Court's finding "that the defendant has violated the regulation and specifically by tying agreements and combination sales prohibited in said Section 7.8(b)" (R. 13-14), (2) whether an affirmative finding of (1) above, where the total price charged by the seller exceeds the maximum legal price for the "wanted" commodity, justifies a finding that the defendant sold liquor at over ceiling prices, and (3) whether an affirmative finding by the lower Court of either (1) or (2) above justifies the granting of the injunction.

## ARGUMENT.

- I. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN THE FINDING THAT THE DEFENDANT SOLD WHISKEY ONLY UPON THE CONDITION THAT THE PURCHASER ALSO BUY SOME OTHER COMMODITY.

Appellant does not argue that the selling of a commodity subject to the regulation only upon the condition that the purchaser buy, in addition, some other commodity, does not violate the provisions of Section 7.8(b) of the regulation, as well he cannot, inasmuch as the language of said section is clear and unambiguous. Furthermore, it has repeatedly been held by the Courts that such practices constitute an evasion not only of this particular regulation but also of other regulations which do not contain a specific provision prohibiting tying agreements or combination sales. *U. S. v. Kraus*, 149 F. (2d) 773 (C.C.A. 2d, 1945); *U. S. v. Armour and Co.*, 50 F. Supp. 347; *Bowles v. Cudahy Packing Co.*, 58 F. Supp. 748; *Brown v. Banana Distributors*, 52 F. Supp. 804; *Bowles v. Inland Trading Co.*, (N.D. Ind.) O.P.A. Desk Book, 2 Opinions and Decisions 2223; *Edelmann v. Bonded Liquors, Inc.*, O.P.A. Desk Book, 2 Opinions and Decisions 2211; *Bowles v. Stafford*, 56 F. Supp. 976; *Bowles v. Thiel*, (E.D. Wis., Jan. 8, 1946). The necessity compelling the Administrator to prohibit tying agreements in order to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices," and to eliminate "profiteering \* \* \* resulting from abnormal market conditions or scarcities

\* \* \*<sup>1</sup> is well stated by the Court in *Edelmann v. Bonded Liquors, Inc.*, *supra*, wherein the Court said:

“In the case at hand the plaintiff, in order to obtain bourbon whiskey, was required to purchase another commodity (gin), whether or not he wanted such other commodity. Consequently, the amount which he paid for this commodity would, in effect, be paid in order to obtain a bottle of whiskey. The value of plaintiff’s dollars thereby became less when, to buy one article, he had to buy something else in addition, with the result the inflationary spiral was started on its way. It takes little imagination to conceive what would happen if the defendant and others were permitted to circumvent the purposes and objectives of the Act in the manner described. Persons in control of scarce articles, like refrigerators, radios, stoves, and other essential household goods, could by reason of such practice unload quantities of plentiful and unwanted articles on the market, with the result the value of the purchasers’ dollars would shrink and the cost of goods would rise. The fact that the charges made for the ‘tied-in’ commodity and the desired article were in the aggregate not in excess of the maximum prices for such articles would not in any sense lessen the inflationary tendencies of such practices, nor make such practices any less in conflict with the purposes Congress sought to achieve by enactment of the Emergency Price Control Act.”

Appellant does argue, however, that the evidence below was insufficient to sustain the finding by the Court

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<sup>1</sup>Section I, Emergency Price Control Act of 1942, as amended.



that defendant sold whiskey only upon the condition that the purchaser also buy other commodities. This contention is, we submit, without merit.

As was correctly stated by the Court in *Bowles v. Stafford, supra* (See Appendix, Appellant's Br.) "This type of case is difficult of proof by the Administrator." This is, of course, due to the natural reluctance of witnesses to testify adversely to the interest of their suppliers, who hold the threat of economic life or death over them under existing marketing conditions. The only manner in which plaintiff can show the existence of violations of this particular type is through the testimony of the purchasers and by circumstantial evidence. The purchasers are all liquor retailers. Due to the scarcity of liquor (mainly whiskey) during the periods here in question, the maintenance by liquor retailers of their businesses as going concerns depends entirely upon their ability to obtain, from wholesalers, the type of liquor which their customers demand. Whiskey is, of course, the most sought-after type of liquor (Appellant's Br. p. 18) and it is self-evident that if a retailer did not have at least some whiskey for sale he would soon lose his customers to others who did. As was brought out by defendant during the trial below (R. 82-84) it instituted a system of allocation of its liquors starting in 1942, under which system it only sold to its customers of long standing, the amount each such customer was allotted being determined on the basis of their previous purchases from defendant. Under this system the defendant closed its doors to new customers. Due to



the great scarcity of liquor during the period here involved there is ample reason to believe that the situation described above applies with equal force to other wholesalers in the San Francisco area, and, as there is no law which requires a wholesaler to sell to any particular retailer, it follows that normally a liquor retailer, in order to remain in business, must maintain the good will of the wholesaler from whom he customarily purchased his commodities.

It is therefore necessary that the obvious reluctance of plaintiff's witnesses to testify against the defendant be borne in mind in analyzing the evidence presented to the trial Court so that the same may be correctly interpreted. Furthermore, it should be noted that although the witnesses who testified below and also the appellant in its brief approached the question of a "tying agreement" with the assumption that an actual "forcing" or "compelling" was necessary in order for plaintiff to make out his case, the word "force" when here used has a different connotation than that normally given it. As was stated by the Court in the case of *Bowles v. Inland Trading Company, supra*:

"There were people who wanted to buy bananas and did not want to buy anything else, and yet were, for a want of a better term, perhaps coerced is too strong, but at least there was a 'must' proposition with these customers to either buy other vegetables or fruits that they did not want or did not need or did not want to buy from this defendant in order for them to buy bananas."

In the instant case there is no evidence that appellant's salesmen informed any liquor retailer, in so

many words, that "we will not sell you whiskey unless you also buy other commodities." Indeed, in view of the economic background given above such plain language was entirely unnecessary in order for said salesmen to accomplish their purpose. Furthermore, such a statement could hardly be expected of salesmen who well knew that "tying agreements" or combination sales" were illegal under a federal statute. A suggestion, by innuendo, was all that was needed to convey to the retailer the necessity of his buying rum or tequila if he expected to obtain whiskey.

Appellant has pointed out that each of the witnesses called by the government denied having been "forced" to purchase anything from the Company. In addition, appellant set forth in its brief, in narrative form, the gist of the testimony of said witnesses. The nicety with which appellant's salesmen applied "force by innuendo" does not therefore appear from its printed brief.

The testimony of Edith Gelsi is typical. The witness testified that she was the owner of a tavern which was managed by herself and her husband. The following conversation took place between said persons and one Mr. Guido, salesman for appellant Company (R. 49-50):

"A. Mr. Guido walked in the door and he said, 'Good morning,' and I said, 'How are you?' And he said, 'Fine, thank you,' and he said, 'How is your husband,' and I said, 'Fine, he is in the back room,' so I called for my husband, so my husband comes in the room, into the tavern, and

my husband started talking to him, and he said, 'Have you any liquor today, any whiskey today?' And he says, 'Yes, but not much,' and my husband says, 'What have you got to sell?' And he said, 'We have got some anchovies.' My husband said, 'We don't need anchovies, we have no grocery store around here and this is a tavern,' and so my husband said, 'What else have you got besides anchovies?' And he says, 'Couldn't you use some anchovies?' And so my husband said, 'Where is my wife?' And he talked to me and he says, 'You can send me some.' And so my husband said, 'What else have you got?' So he opened up his show case, his suitcase, and he read out what he had down in his store, and so my husband asked him, 'Have you any whiskey?' And he said, 'We are very low on whiskey.' He said at that time it was very scarce, and so he went through the list from A to Z what he thought he could sell and what we could use at the present time, and we said he had a little of everything else on the shelf, and my husband said, 'How about some whiskey,' And he said, 'Well, I can sell you half a case.' "

Several things are noteworthy regarding the above testimony. In the first place, notwithstanding the fact that the witness' husband had told the salesman that he could not use anchovies in his business, the salesman persisted in "suggesting" that the witness purchase anchovies. Secondly, no mention was made concerning the amount of anchovies to be purchased, nor the price to be paid therefor (this was no doubt provided for by the "allotment system"). Furthermore,

the salesman refused to enter into any discussion regarding the sale of whiskey until Mrs. Gelsi had purchased other commodities.

The testimony of Mattie R. Parker is enlightening in regard whether this witness actually desired to purchase rum which was sold her by appellant. The witness was asked by counsel for Administrator (R. 30-31):

“Q. There is an invoice of June 21 for half a case of Calvert Lord,  $\frac{1}{2}$  case Old Fitz, and a case of Marin Rum Gold. Did you want all of those?

A. Well, I did not refuse any of them.

Q. Did you order any of them?

A. I did not order them, I took what was allocated to me.

Q. Did you want the rum?

A. I did not refuse any of it. Naturally, whiskey being the biggest seller, and they being out of whiskey, I did not refuse any of it.

Q. Here is one of May 25,  $\frac{1}{2}$  case Calvert Reserve,  $\frac{1}{2}$  case Old Fitz,  $\frac{1}{2}$  case Nautical Rum,  $\frac{1}{2}$  case Hermosa Tequila.

A. Yes.

Q. Did you order those items?

A. No, I took whatever I could get, whatever I was allocated.

Q. Did you want each of them?

A. Well, I wanted to get anything I could get, but, as I said before, I preferred to have whiskey.”

In the same connection Mr. Ferroni, a restaurant operator who also sold liquor, was called by the Ad-



ministrator. The following testimony was given (R. 37-38):

“Q. Didn’t he tell you in June of last year that if you wanted to make a deal he would let you have 10 cases of Fitzgerald Whisky if you took 12 cases of Hermosa Tequila and 3 cases of Anis Gorilla?

A. He didn’t tell me that. I say I would like to have 10 cases of whisky, and we talked and talked, and he asked me if I wanted a dozen cases of Tequila, and 2 or 3 cases of the Anis Gorilla. \* \* \* What he says, ‘Do you want to take any Anis Gorilla, about two or three cases.’ I say I will buy that, and when he talk about Tequila, I buy that. I will tell you, they don’t force me to buy anything.”

That these witnesses were hostile to the government (for the economic reasons previously stated) is beyond question. Mattie R. Parker, A. Ferroni, and Nat Lasser all admitted while testifying that they had previously given signed statements to Frank Richardson, an Office of Price Administration investigator, to the effect that they had purchased liquor items other than whiskey from the defendant in order to be able to obtain whiskey. Mr. Richardson himself testified that these statements were made freely and in unequivocal language (R. 62-67).

Although the regulation does not require that the one commodity be scarce, and the commodity which is “tied to it” be plentiful,<sup>2</sup> there was ample evidence be-

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<sup>2</sup>Section 7.8(b) of the Regulation does not exempt from its scope either commodities which are scarce or those which are plentiful: on the contrary, it specifically states that the Regulation shall not be evaded by the sale of a “commodity \* \* \* covered by this regulation, alone or in conjunction with *any other commodity*.” (Emphasis supplied.)



fore the trial Court that at the time the transactions here involved took place (June and July, 1944) the demand for liquors other than whiskey was practically non-existent, and that defendant's customers, instead of desiring to purchase more of such items, were growing panicky worrying over how they could get rid of their overloaded shelves. On June 22, 1944, Mr. H. J. Haaf, the defendant's vice-president in charge of sales, issued a bulletin (R. 115-118) to defendant's salesmen wherein said vice-president stated, under the heading of "Odd Items" (R. 116):

"Many customers are already asking how they can dispose of Rum, Imported Gin, Tequila, Brandy, Vodka, etc., etc. 'Can I cut prices?' and numerous other questions are being asked. It appears that some of the trade are becoming panicky. Right here it should be borne in mind that where it is thought necessary everyone has about sixty days to reduce inventories. Furthermore, while the demand for these items will unquestionably drop, *it will not cease entirely.*"

Viewed in this context we submit that the evidence clearly shows these was at least a "must"<sup>3</sup> proposition advanced by defendant's salesmen, which was clearly understood, not only by the liquor retailers, but by the learned trial Judge. The rejection by the lower Court of the witnesses' statements that they were not "forced" to buy anything from the defendant was not only within the Court's province in view of the obvious conflict between such statements and the recitals by the witnesses of the actual conversations which took place between themselves and defendant's

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<sup>3</sup>See *Bowles v. Inland Trading Company, supra.*

salesmen, but, in the light of all of the evidence submitted, was entirely reasonable.<sup>4</sup>

It is also noteworthy that although defendant during the trial made much of the fact that the retailers to whom it allocated its liquors had the right to return for credit any of said liquors which the retailers did not desire, none of said retailers actually returned any of the liquor sent them.<sup>5</sup> The reason is obvious. Moreover, although an inter-office bulletin issued by the said Mr. Haaf on August 4, 1944, indicates that a customer could return goods sent to him under the allocation system (R. 112), there is evidence that at the time of the sales here in question the contrary was the fact. Mr. Haaf's bulletin of June 22, 1944, specifically states that (R. 117) "Under the State Board of Equalization Ruling, which has been in effect for a number of years past, no goods are returnable for credit."

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<sup>4</sup>Although there is no necessity here for appellee to treat the witnesses' admissions, made in Court while under oath (that they had previously stated that appellant forced them to purchase unwanted commodities) as substantive evidence in order to sustain the lower Court's decision, it is noteworthy that there is a growing tendency among the Courts so to do. See 3 Wigmore on Evidence, 3rd Ed., 1940, Sec. 1018, and cases there cited; 30 Cornell Law Quarterly 511, 514. As was stated by Judge Learned Hand in the case of *Di Carlo v. U. S.*, 6 F. (2d) 364 (1925), cert. den. 268 U. S. 706: "The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." This language was quoted with approval by Judge Garrecht in the case of *Craig v. U. S.*, 81 F. (2d) 816 at p. 828.

<sup>5</sup>One case of rum was cancelled by Mr. Lasser (R. 98) prior to its being sent him.

II. THE SALE OF WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY SOME OTHER COMMODITY CONSTITUTES AN OVER THE CEILING SALE WHERE THE PRICE CHARGED FOR BOTH COMMODITIES EXCEEDS THE MAXIMUM PRICE FOR THE WHISKEY, AND THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE LOWER COURT'S FINDING THAT SUCH OVER-CEILING SALES TOOK PLACE.

As was previously pointed out, it was stipulated by counsel that the price charged the various liquor retailers by appellant for the whiskey plus other commodities exceeded the maximum price permissible under the regulation for the whiskey alone (R. 27). As was shown under Point I above, the appellant conditioned the sale of its whiskey upon the purchaser buying other commodities. This constitutes the selling of whiskey at a price in excess of its maximum legal price. The lower Court obviously concluded that the whiskey was the wanted commodity and that the retailers did not want or desire to purchase the rum, tequila, anchovies, etc., which were "allocated" to them (R. 12-14). This was in accord with the evidence. For example, Mattie Parker's only reply to repeated questions regarding whether or not she wanted the secondary items which she had not ordered was "Well, I did not refuse any of them" (R. 30-31). Edith Gelsi testified her husband pointedly told the salesman that "We don't need anchovies, we have no grocery store around here and this is a tavern" (R. 49).

It has often been held that where, as here, the question is one of intent, the trial judge who has heard the witnesses must sift the truth from the lies, and his findings based upon that portion of the testimony

which he accepts as true, must be treated as unassailable. This Court stated in *Wittmayer v. U. S.*, 118 F. (2d) 808, at 811:

“As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L.Ed. 356 (citing *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses ‘depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.’ ”

As was recently pointed out by Judge Learned Hand in *U. S. v. Aluminum Co. of America*, 14 F. (2d) 416, at page 433: “The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds.” Judge Hand concludes that “upon an issue like the witness’ own intent, as to which he alone can testify, the finding is indeed unassailable, except in the most exceptional cases.”

That the appellant received additional consideration, over and above the maximum price which he charged for the whiskey, from the sale of the “tied-in” commodities is apparent, as it received the benefit of disposing of commodities which were not in demand



by either the retailers or the public.<sup>6</sup> The ability to dispose of merchandise is itself a thing of value. It is to be noted that Section 302(b) of the Emergency Price Control Act (50 U.S.C. App., Supp. IV, 942(b)) defines price as "the consideration demanded or received in connection with the sale of a commodity."

Similarly, the purchasers in this case paid more than ceiling prices for the whiskey. In order to obtain this whiskey they had to purchase other liquors which they did not want. Whether or not they were later able to sell these other commodities is immaterial; at the moment of sale they were required to expend more than the ceiling price in order to obtain the scarce commodity. To illustrate, a retailer who has \$100 with which to purchase a supply of whiskey which his customers want cannot buy said whiskey if, in addition, he is required to buy \$100 worth of vodka, even though the vodka may be worth \$100 and even though he may, at some later time, be able to dispose of said vodka. The necessity of making an undesired purchase is therefore in itself an additional burden to the purchaser and thus a consideration beyond the established price. We therefore submit that the appellant was guilty of violating the regulation in that he sold whiskey at a price in excess of the maximum price permissible.

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<sup>6</sup>See Bulletin issued by Vice-President in Charge of Sales of defendant Company, dated June 22, 1944 (R. 116), previously quoted in this brief.



III. UNDER RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE, AS INTERPRETED BY A MAJORITY OF THE CIRCUIT COURTS OF APPEALS OF THE UNITED STATES, THE APPELLATE COURT WILL NOT WEIGH CONFLICTING EVIDENCE UPON WHICH THE COURT BELOW BASED ITS FINDINGS OF FACT IN A CASE TRIED WITHOUT A JURY, BUT WILL MERELY DETERMINE WHETHER THERE WAS "SUBSTANTIAL" EVIDENCE TO SUSTAIN SAID FINDINGS.

Appellant contends (Opening Br. pp. 22-23) that under Rule 52(a) of the Federal Rules of Civil Procedure this Court will set aside the findings of fact of the trial Court if said findings are against the clear weight of the evidence. Although appellee has amply shown that the findings of the lower Court are not against the clear weight of the evidence, nevertheless the Administrator desires to point out that appellant has inaccurately stated the rule. Appellant, in support of its contention, has cited the following cases:

*State Farm Mutual Automobile Insurance Company v. Bonnacci*, 111 F. (2d) 412 (C.C.A. 8th);

*Schultz v. Manufacturers and Traders Trust Company*, 128 F. (2d) 889 at 900 (C.C.A. 2nd);

*Aetna Life Insurance Co. v. Kepler*, 116 F. (2d) 1 (C.C.A. 8th);

*Fleming v. Palmer*, 123 F. (2d) 749 (C.C.A. 1st).

The first two cited cases by appellant are not in point. In the *State Farm* case the findings are based upon evidence given not in the presence of the lower Court but during the trial of another action in a state Court. The Circuit Court of Appeals held that since

the District Court had no better "opportunity of judging the creditability of the witnesses than did it, the scope of review was enlarged to include the weighing of conflicting evidence by said Appellate Court.<sup>7</sup>

The language of Judge Frank in the *Schultz* case, *supra*, cited by appellant, is merely another statement of the same rule.

The First and Eighth Circuits apparently follow the rule as stated by appellant. However, an analysis of the decisions of the other circuits discloses that the First and Eighth Circuits do not represent the majority view on this subject, nor do they accord with the practice of this Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides that the findings of fact made by a trial Court without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witness". Prior to the enactment of the rules it was generally stated that in actions at law review of the facts was limited to the inquiry as to whether they were supported by any substantial evidence, while in an equity appeal the entire record was open to the Appellate Court to re-examine all the facts, and the findings could be reversed if it was against the clear weight of the evidence. With the abolition of the distinction between law and equity,

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<sup>7</sup>This is, of course, in accordance with the rule well established in this and other circuits. Indeed, this Court has held in *Equitable Life Insurance Company v. Irelan*, 123 F. (2d) 462, that when the evidence below is given by deposition, the reviewing Court gives only "slight weight" to the findings of the trial judge.

the advisory committee was faced with the choice of the type of review to be adopted for the trial of cases by a Court without a jury. The committee was in disagreement on this subject, Dean Clark advocating the adoption of the law type of review, and a majority of the committee favoring extension of the equity review to all issues tried by the Court.<sup>8</sup> Accordingly, the draft first submitted to the Supreme Court adopted the equity formula: "The findings of the Court in such cases shall have the same effect as that heretofore given to findings in suits of equity." However, in the second proposed draft<sup>9</sup> this language was changed to that which presently appears in Rule 52. It is also significant that the final committee note states, not that Rule 52 adopts, but merely that it is "*in accord*" with the modern federal equity practice.

In view of this background it was contended by legal writers immediately after the rules were promulgated that the scope of review called for by Rule 52(a) did not necessarily follow the equity type review.<sup>10</sup>

The trend of decisions since 1939 sustains this view. While it is frequently stated that Rule 52(a) merely formulates the old equity method of review, the Circuit Courts of Appeals in most of the circuits have actually adopted a type of review which is much closer to the law type. Except in the First and Eighth

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<sup>8</sup>Clark and Stone, Review of findings of fact, 4 U. Chi. L. Rev. 190, 191-192; Note to the Supreme Court following proposed Rule 68, preliminary draft (1936).

<sup>9</sup>Proposed Rule 59, Report of the Advisory Committee, 1937.

<sup>10</sup>Federal Appellate Practice as Affected by the New Rules of Civil Procedure, Werner Ilse and Robert E. Hone in 24 Minn. L. Rev. 1, 2 F.R.S. 736.

Circuits, the test applied by the Courts is merely whether substantial evidence appears in the record to sustain the findings of the Court, and no review of the evidence is undertaken for the purpose of determining where the preponderance lies. This is particularly true of cases in which, as in the case at bar, the ultimate question to be decided is that of the intent of witnesses and the most important factor in the case is the credibility of their testimony.

In the Tenth Circuit,<sup>11</sup> Seventh Circuit,<sup>12</sup> Sixth Circuit,<sup>13</sup> Fifth Circuit,<sup>14</sup> and Second Circuit<sup>15</sup> the Courts have applied the substantial evidence rule. In *Webb v. Frisch*, 111 F. (2d) 887, 888 (1940) the Court stated:

“Our function is to review the finding of the lower court and not to pass upon the evidence *de novo*. We cannot say that a finding of the fact of prior use is ‘clearly erroneous’ merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of witnesses the full weight and quality of credibility which the trial court gave it.”

In *Andrew Jergens v. Conner*, 125 F. (2d) 686 (C.C.A. 6th) the Court stated that the lower Court’s findings of fact are conclusive on appeal “no matter

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<sup>11</sup>*U. S. v. Prosch*, 137 F. (2d) 92 (1943); *Continental Oil Company v. Bowles*, 113 F. (2d) 557, 564 (1940).

<sup>12</sup>*Webb v. Frisch*, 111 F. (2d) 887, 888 (1940); *Gary Theater Co. v. Columbia Pictures Corp.*, 120 F. (2d) 891, 894, 895 (1941); *McDaniel v. U. S.*, 108 F. (2d) 450 (1939).

<sup>13</sup>*Andrew Jergens v. Conner*, 125 F. (2d) 686.

<sup>14</sup>*C.C.C. Company v. U. S.*, 147 F. (2d) 820; *City of Baton Rouge v. Robinson*, 127 F. (2d) 693.

<sup>15</sup>*Corbett v. Halliwell*, 123 F. (2d) 331 (1941).



how convincing the argument that upon the evidence the findings should be different, unless there is no substantial evidence to support them.”

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#### IV. THE LOWER COURT PROPERLY ENJOINED THE APPELLANT FROM SELLING LIQUOR AT OVER THE CEILING PRICES.

Appellant assigns as one of its grounds of error the fact that the District Court enjoined the company from selling whiskey or liquors at prices in excess of those permitted by the regulation (Appellant's Opening Brief, p. 4) for the reason that no proof was offered that appellant sold any liquor at a price in excess of the maximum permissible price.

As has been shown (Point II, *supra*) there is no basis for such a contention inasmuch as appellant's violations constituted sales of whiskey at over the ceiling prices. Even were this not true, appellant's position would still be without merit inasmuch as violations of the evasion clause of the regulation (as shown by Point I, *supra*) fully warranted the Court in restraining appellant from committing other related, unlawful acts. *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 436, 61 S. Ct. 693, 699; *National Labor Relations Board v. Sun Tent-Luebbert Co.*, 151 F. (2d) 483, 489; *Bowles v. May Hardwood Co., et al.*, 140 F. (2d) 914 (C.C.A. 6th); *cf. Bowles v. Luster, et al.*, C.C.A. 9th (Jan. 31, 1946).



**CONCLUSION.**

Appellee submits that for the reasons given above the judgment of the District Court should be affirmed. As was pointed out by this Court in the case of *Bowles v. Huff*, 146 F. (2d) 428 (an appeal taken by the Price Administrator from a judgment of Judge Roche wherein the lower Court's action in denying injunctive relief was sustained even though the defendant had stipulated to the entry of a judgment for such relief):

“We are deprived of the advantage of seeing and hearing the witnesses in this case and we cannot weigh with unerring accuracy the value attached by the trial court to the impressions stemming from trial experience. To attempt to do so in this case would be to substitute our judgment on issues of fact, for that of the trial court.”

Dated, San Francisco, California,  
February 27, 1946.

Respectfully submitted,

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

HERBERT H. BENT,

Regional Litigation Attorney,

JACOB CHAITKIN,

Special Appellate Attorney,

*Attorneys for Appellee.*

United States of America, Plaintiff-Appellee, v. George F. Fish,  
Inc., and Michael Simon, Defendants-Appellants.

Per Curiam--

We granted rehearing here to consider petitioners contention that the reversal in *M. Kraus & Bros. v. United States*, S. Ct., Mar. 26, 1946 of our earlier decision in *United States v. M. Kraus & Bros.*, 2 Cir., 149 F.2d 773, cited by us in the opinion herein, required reversal of this conviction. But a careful study of the four opinions rendered by the Supreme Court in that case leads us to doubt that a majority of the justices would hold the regulation here in question too limited to cover the acts charged and proved. There all the justices agreed that the Price Administrator could prohibit evasion of established price ceilings by the mere device of a tie-in sale, i.e., the requirement of a purchase of a secondary product along with the product subject to a maximum price. They divided only as to whether the regulation in question did clearly prohibit such a sale. A majority therefore held that in the absence of clear language to that effect, conviction could be had only upon proof of deficiency in value of the secondary product below its sales price and consequent break-through of the ceiling price on the main article.

Here the regulation, unlike that in the *Kraus* case, expressly prohibited evasion "by tying-agreement". The question is then whether this definite language supplies the gap found in the other case. Petitioners interpret the prevailing opinion there as requiring more than even these descriptive words to accomplish the outright prohibition required. Possibly this may be so, though the government draws a contrary conclusion and relies heavily upon Justice Murphy's citation of our decision here.

But, be that as it may, one of the concurring opinions, that of Justice Rutledge concurred in by Justice Frankfurter, who also concurred in Justice Murphy's opinion--appears to stress the failure of the regulation there to forbid "tie-in" sales "per se". This would seem to us to be what the present regulation does in so many words. And seemingly the three dissenting Justices would agree a fortiori. Under these circumstances of doubt that the insufficiency of the regulation is assured, we think we can appropriately maintain our view that a customer who is forced to buy melons, broccoli, or celery in order to buy lettuce is thereby required to give an additional consideration for the lettuce, and that there is therefore evasion of the stated price limitation "by tying-agreement".

Hence, having heard and considered the petition, we now reaffirm our former decision.

Judgment affirmed.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 8881

October Term, 1945, January Session, 1946.

CHESTER A. BOWLES, Administrator,  
Office of Price Administration for  
and on Behalf of the United States,

Plaintiff-Appellee,

vs.

ROYAL WINE & LIQUOR, INC.,  
a Corporation,

Defendant-Appellant.

Appeal from the District  
Court of the United States for  
the Northern District of Illinois,  
Eastern Division.

February 22, 1946.

Before STARRS, MAJOR and KERRER, Circuit Judges.

MAJOR, Circuit Judge. The Administrator of the Office of Price Administration sought an injunction enjoining defendant from violating Maximum Price Regulation 445 (8 P. R. 11161). A temporary restraining order was entered upon the Administrator's complaint and attached affidavits. After a hearing, the lower court entered an order awarding a preliminary injunction, and from this order defendant has appealed.

Defendant, an Illinois corporation, is engaged in the wholesale liquor business at Chicago, Illinois. Defendant employs seventeen salesmen to contact its customers and has been in business since 1904. The only question involved in the court below was whether defendant had violated MFR 445 by making tie-in sales. These are sales wherein a customer is allowed to purchase a desired article only by also purchasing a certain amount of an undesired article. This practice is clearly violative of the regulation mentioned.

The District Judge found as a fact:

"4. Defendant has since and including November 10, 1944, sold, offered to sell and delivered packaged distilled spirits at prices in excess of the maximum price therefor, as established under the provisions of Maximum Price Regulation No. 445, as amended, and has evaded the price limitations set forth in said regulation with respect to packaged distilled spirits, by means of tying agreements requiring as a condition to the purchase of such packaged distilled spirits that its customers purchase some other packaged distilled spirits, item or commodity."

Defendant contends that this finding is without substantial support, but even so that the court abused its discretion in awarding an injunction. Furthermore, it is contended that even though the injunction was proper, it is too broad in scope.

The evidence relative to this finding is in sharp conflict: Plaintiff's witnesses, customers of defendant, testified that as a condition to purchasing bonded whiskey (an article in high demand) they were required to purchase wine, rum or brandy (articles with less demand). Defendant's witnesses, its salesman, contradicted this testimony. It is apparent that this conflict was to be resolved by the lower court. The court resolved the conflict against defendant and this resolution cannot be disturbed by us. Accepting the court's finding as we must, we think there was no abuse of discretion in the issuance of an injunction.



This brings us to the more serious question as to the scope of the injunction. Defendant vigorously urges that the injunction is too broad. Specifically, the defendant objects to the language in the injunction which restrains it from violating price ceilings not presently established but which may be established by regulations hereafter adopted by the Administrator. We set forth below the pertinent provisions of the injunction as entered. The italicized portions are the ones to which defendant objects. Defendant was enjoined from directly or indirectly:

"(a) Selling, delivering, soliciting the sale of, or offering for sale or delivery, or attempting or agreeing to sell packaged distilled spirits at prices in excess of the maximum prices established therefor under the provisions of Maximum Price Regulation No. 445, as now or hereafter amended, or any other Office of Price Administration regulation which may hereafter be issued establishing maximum prices for the sale of packaged distilled spirits, as said latter regulation may hereafter be amended or revised; and

"(b) Evading the price limitations contained in Maximum Price Regulation No. 445, as now or hereafter amended or revised, in connection with any offer, solicitation, agreement, sale or delivery, whether or not by means of tying agreements requiring as a condition to the purchase of packaged distilled spirits that defendant's customer or customers purchase some other packaged distilled spirits, item or commodity;

"(c) Otherwise violating Maximum Price Regulation No. 445, as now or hereafter amended, or violating any other regulation or order which may hereafter be issued pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for packaged distilled spirits."

The propriety of the scope of this injunction depends, in our judgment, upon the interpretation which may properly be placed upon it. No question is raised but that it is directed solely at maximum prices for packaged distilled spirits as fixed by the existing regulation, an amended regulation, or a new regulation which may be promulgated by the Administrator concerning

the same subject matter. As thus interpreted, we are of the view that the injunction is not vulnerable to attack because of its scope. No good purpose could be served in citing or discussing the numerous cases which have dealt with a similar situation. Our conclusion finds support in Bowles, Price Administrator v. Montgomery Ward & Co., Inc., 143 F. 2d 38; Bowles, Administrator v. May Hardware Co., et al., 140 F. 2d 914; Bowles, Administrator v. William Leithold, et al. (C.C.A. 3d), decided December, 1945, not yet reported. See also United States v. Hart, 320 U. S. 631, 636. In sustaining the injunction, we are not unmindful of defendant's reliance upon National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, and New York, New Haven and Hartford Railroad Co. v. Interstate Commerce Commission, 200 U. S. 361. We think these cases are not controlling in the instant situation.

The order appealed from is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Circuit Court  
of Appeals for the Seventh Circuit.

No. 11147

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.

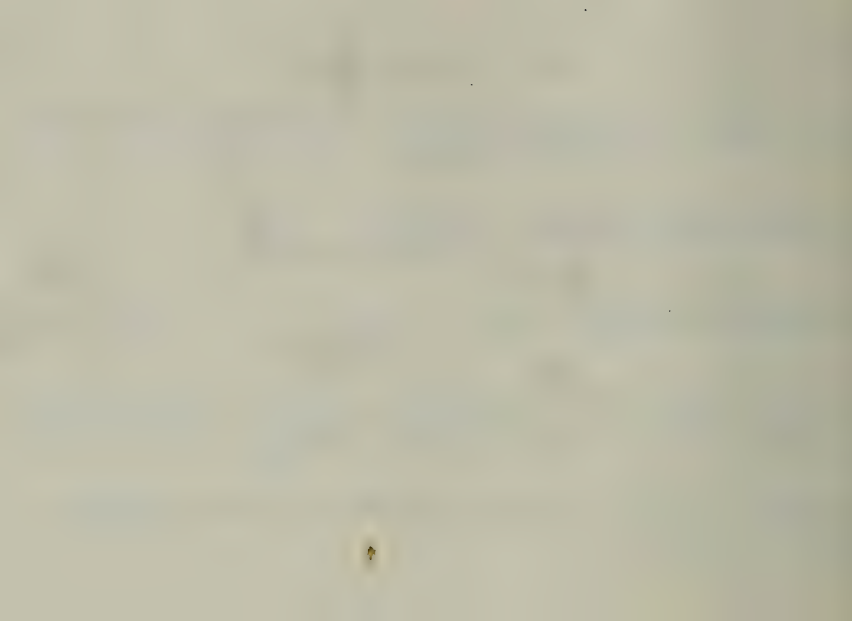
COFFIN-REDDINGTON COMPANY,  
Appellant,

vs.

CHESTER BOWLES, Admr., OPA.,  
Appellee.

BY OPINION OF SUPREME COURT OF THE UNITED  
STATES IN M. KRAUS & BROS, INC., vs. U.S.A.

Submitted by counsel for appellee as a Supple-  
mental Authority)



# SUPREME COURT OF THE UNITED STATES.

No. 198.—OCTOBER TERM, 1945.

M. Kraus & Bros., Inc., Petitioner,	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
vs.		
United States of America.		

[March 25, 1946.]

Mr. Justice MURPHY announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.<sup>1</sup>

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269,<sup>2</sup> promulgated by the Price Administrator pursuant to Section 2(a) of the Emergency Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner “unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring” the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner’s president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is commonly known as a “combination sale” or a “tying agreement.” It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

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<sup>1</sup> 56 Stat. 23; 50 U. S. C. App. § 901 *et seq.*  
<sup>2</sup> 7 Fed. Reg. 10708; reissued with amendments, 8 Fed. Reg. 13813.



The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the proffered testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to

the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of  $37\frac{1}{2}$  cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined \$2,500 on each count, a total of \$22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 149 F. 2d 773. In our opinion, however, the conviction must be set aside.

Section 205(b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act." Section 4(a) of

the Act in turn provides that "It shall be unlawful . . . for any person to sell or deliver any commodity, . . . in violation of any regulation or order under section 2 . . ." Section 2(a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and effectuate the purposes of this Act." Section 2(g) further states that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to Section 2(a), issued Revised Maximum Price Regulation No. 269 on December 18, 1942,<sup>3</sup> which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from Section 2(g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in Section 1. *Yakus v. United States*, 321 U. S. 414, 423. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of Sections 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices.<sup>4</sup> Cf. *United States v. Eaton*, 144 U. S.

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<sup>3</sup> Reissued with amendments on October 8, 1943. See note 2.

<sup>4</sup> Section 205(b) is somewhat inartistically drawn. It does not specifically impose criminal liability on those who violate the regulations and orders of the Administrator. But the hurdle of *United States v. Eaton*, 144 U. S. 677, is cleared by the reference in Section 205(b) to Section 4, which makes it



677. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Section 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States v. Wiltberger*, 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by con-

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unlawful, among other things, to sell or deliver any commodity in violation of any regulation or order. See *In re Kollock*, 165 U. S. 526; *United States v. Grimaud*, 220 U. S. 506; *United States v. George*, 228 U. S. 14; *Singer v. United States*, 323 U. S. 338. Congress has subsequently emphasized this reference even more clearly when, in adding Section 204(e)(1) to the Emergency Price Control Act, it spoke of a criminal proceeding "brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2." Section 107(b), Stabilization Extension Act of 1944, 58 Stat. 639. See also Section 6, Act of June 30, 1945, Public Law 108, amending Section 204(e)(1) of the Emergency Price Control Act.

temporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207.

In light of these principles we are unable to sustain this conviction of the petitioner based upon Section 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414, 427-431; *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 418-419; *Case v. Bowles*, — U. S. — (slip opinion, p. 3). The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue of the language he used in Section 1429.5. That issue we answer in the negative.<sup>5</sup>

Section 1429.5, so far as here pertinent, provides that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention

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<sup>5</sup> Cf. *United States v. George F. Fish, Inc.*, — F. 2d — (C. C. A. 2, Feb. 8, 1946).



is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to Section 302(b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of Section 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.<sup>6</sup>

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of Section 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of

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<sup>6</sup> The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. Thus, in an interpretation issued November 5, 1943, applicable to all maximum price regulations, the Administrator, in discussing violations and evasions, made the following interpretation as to tying agreements:

"(a) *As to freeze regulations:* A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

"(b) *As to regulations other than base period freeze regulations:* OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

"For example, it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond."

O. P. A. Service (Pike & Fischer) vol. I, p. 2:812.

conjecture and to give effect to an unstated judgment of policy.

The language of Section 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices. The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in Section 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in Section 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." Section 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed. Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." Section 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed. Reg. 9126. See also Section 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were

permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret Section 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the informations can be interpreted as charging a crime under Section 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "that were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches to them." While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, — U. S. —, (slip opinion, p. 5).

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of Section 1429.5.

*It is so ordered.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.



Mr. Justice DOUGLAS, concurring.

If a retailer sold meat or any other commodity to a consumer only on condition that he purchase and pay for a wholly worthless article, it would be clear that price ceilings had been violated. For the attribution of value to the worthless article would be nothing more than an evasive method of increasing the ceiling price on the other commodity. I can see no difference where the additional commodity, although it has value, has no value to the purchaser.

But this case is different in both respects or so the jury might find. First, chicken gizzards, chicken skin, or chicken feet are not wholly worthless articles. There is demand for them and they have a value. Second, they were tied-in with sales to retailers who constitute the market for chicken gizzards, chicken skin, and chicken feet. If in fact they had no value on that market, evasion of price ceilings would be established. But since they apparently had some value on the retail market, no violation of price ceilings occurred unless the price charged for them in fact exceeded that market value. That might be shown either by proof of the fact that the market value was lower or by showing that the quantity forced on the retailers was in excess of the quantity which the market could absorb.

The case should be remanded for a new trial on that basis. For the trial court ruled that the additional articles sold were valueless and that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other." That ruling took from the jury the basic issue in the case.

I think there was evidence that these chicken gizzards, chicken skin, and chicken feet were valueless to some of the retailers and that a conviction would be warranted. But it is not enough that we conclude on the whole record that a defendant is guilty. *Bollenbach v. United States*, 326 U. S. ——. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt.

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Mr. Justice RUTLEDGE, concurring.

I am in agreement with the result and substantially so with Mr. Justice MURPHY's opinion. I do not think that administra-

tive regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function. If the regulations involved here had been enacted specifically by Congress in statutory form, I do not think they could properly be construed to forbid tie-in sales of these commodities *per se*.

As the opinion points out, the regulations, with reference to other commodities, expressly prohibited tie-in sales, regardless of whether the tied-in commodity had value. Persons dealing in those commodities were specifically informed by the regulations, therefore, that such sales would be in violation of the Act. There was no such specific prohibition applicable at the time of the sales in question to sales of poultry. However the general prohibition against evasion contained in § 1429.5 of Revised Maximum Price Regulation No. 269 might be interpreted, if there had been no regulations specifically forbidding tie-in sales of other commodities, in view of their existence and the absence of any similar provision relating to poultry, I do not think it permissible to construe § 1429.5 as covering the same ground. Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content.

Accordingly I agree with the conclusion that tie-in sales were not forbidden at the time of these sales, as to poultry. I also agree that the trial court, both in its instructions and in some of its rulings upon the admissibility of evidence, went on a conception of the law inconsistent with this view. I therefore concur in the Court's disposition of the cause.

Mr. Justice FRANKFURTER, although agreeing with the opinion of Mr. Justice MURPHY, also joins in this opinion.



Mr. Justice BLACK, dissenting.

We were at war in 1943. Scarcity of food had become an acute problem throughout the nation. To keep the public from being gouged the government had set ceiling prices on food items. Congress had made it a crime to sell food above these ceiling prices. When Thanksgiving Day approached there were not enough turkeys to supply the demand of the many American families who wanted to celebrate in the customary style.

The information filed in the district court charged that the petitioner "unlawfully, wilfully and knowingly evaded the provisions of . . ." Revised Maximum Price Regulation No. 269, § 1429.5, by compelling and requiring the buyer to purchase chicken feet, chicken skin, or gizzards at a specified price, as a condition of the sale of poultry to them. During peace times the petitioner had ordinarily done a gross business of seven-and-a-half million dollars a year. In 1943, presumably due to the meat shortage incident to the war, the petitioner's gross business was not quite four million dollars. This meat shortage was felt acutely during the Thanksgiving season, when petitioner instead of his usual 100 to 150 cars of turkeys received only one car. When the retail butchers and poultry market proprietors came clamoring for their share of the small supply (which the defendant rationed among them) they found that along with the turkeys which they wanted so badly petitioner gave and charged them for large amounts of chicken feet, skins and gizzards which they had not asked for at all and which for the most part they had never before sold as separate items. While the butchers paid in addition to the ceiling price charged for the turkeys the price charged for the chicken skins and feet, they did so only because they understood that unless they bought these unwanted items they could get no turkeys. Only one of the butchers sold all the chicken skins to his customers. He explained that he operated his store in a poor neighborhood where the food shortage had become so acute that people were willing to buy anything they could get. As to the rest of the butchers, some simply dumped the chicken skins and feet while others, after diligent efforts, sold a few pounds and then gave the rest away either to their customers, or to charitable institutions. Certainly these particular butchers forced to buy these unwanted items for the first time were not the regular retail outlet for disjointed chicken feet and peeled chicken skins, if

there ever was such an outlet on a voluntary basis. It is clear therefore that as a result of petitioner's forcing his customers to buy the feet and skins along with the turkeys, the retailers' cost price of the turkeys was in effect increased beyond the ceiling.

In my opinion petitioner's practice in forcing the butchers to buy unwanted chicken feet in order to get wanted turkeys amounted to a direct violation of the Price Control Act. It certainly was no less a violation of the Administrator's regulation against evasion. In promulgating this regulation the Administrator could not possibly foresee every ingenious scheme or artifice the business mind might contrive to shroud violations of the Price Control Act. The regulation does not specifically describe all manner of evasive device. The term "tying agreement" nowhere appears in it and a discussion of such agreements is irrelevant. We need not decide whether what petitioner did would have violated every possible hypothetical regulation the Administrator might have promulgated. The regulation here involved prohibits every evasion of the Price Control Act. It thus condemns all actions that are "on the wrong side of the line indicated by the policy if not the mere letter of the law." *Buller v. Wisconsin*, 240 U. S. 625, 631. What petitioner did here is on the wrong side of both letter and policy. The Court does not deny that there was ample evidence to support the jury's finding that petitioner did what the information charged it with doing. In my opinion that was a crime.

Had butchers been required to buy bags of stones as a condition to buying turkeys, I think it would have been hard to persuade them, or anybody else, that the seller who forced them to do so was not guilty of violating and evading the law. Had people who wanted and needed bacon, at the time when bacon was almost impossible to purchase, been required to buy hog hoofs and hog skins with each purchase of a pound of bacon, I think the sellers would have violated the law. If the wholesaler can require the retailer to purchase unwanted items the retailer can force the ordinary consumer to do the same thing. A restaurant could then force its customers to purchase used kitchen fats along with their meals. It would be little consolation to a customer forced to do so to learn that soap factories can use these fats and would be willing to purchase them. He would pay the price, and either dump the fat into the nearest ashean or tell the waiter to take

the smelly substance away. The result would be increased cost of meals in that restaurant. Thinly disguised subterfuges like the one here adopted should not be sanctioned by courts. Once they are sanctioned, laws enacted by Congress for the public welfare are no longer respected.

When food is scarce and people are hungry it is a violation, both of the letter and spirit of the Price Control laws, to require consumers or retail stores where they make their purchases, to buy things that they neither need nor want as a condition to obtaining articles which they must have. I dissent from the Court's disposition of this case.

Mr. Justice REED and Mr. Justice BURTON join in this opinion.

Coffin. Washington

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 158—October Term, 1945.

(Argued January 7, 1946      Decided February 8, 1946.)

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—v.—

GEORGE F. FISH, INC., and MICHAEL SIMON,

*Defendants-Appellants.*

---

Before :

L. HAND, CLARK and FRANK,

*Circuit Judges.*

---

Appeal from the District Court of the United States  
for the Southern District of New York.

George F. Fish, Inc., and Michael Simon were convicted  
of violating maximum price regulations established under  
the Emergency Price Control Act of 1942, 50 U. S. C. A.  
Appendix, §901 *et seq.*, and they appeal. Affirmed.

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LEWIS F. GLASER, of New York City (Edgar F.  
Sachs, of New York City, on the brief), *for*  
*defendants-appellants.*

JOHN C. HILLY, Asst. U. S. Atty., of New York  
City (John F. X. McGohey, U. S. Atty., of  
New York City, on the brief), *for plaintiff-*  
*appellee.*



CLARK, *Circuit Judge*:

An information filed in the District Court charged the defendants George F. Fish, Inc., a wholesale dealer in fruits and vegetables, and Michael Simon, its salesman, with "unlawfully, wilfully and knowingly" evading the provisions of Revised Maximum Price Regulation No. 426, issued under the authority of §2, Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, §902. After a jury verdict of guilt, the court entered judgment of a fine against the corporate defendant, and imprisonment against the individual defendant. 50 U. S. C. A. Appendix, §§904, 925(b). Defendants appeal from the conviction, urging the invalidity of the regulation, the failure of the information to allege a crime, the insufficiency of the evidence to support the verdict, and the nonliability of the corporate defendant to criminal prosecution for the acts charged.

While the regulation does not appear doubtful or unclear to us, *United States v. M. Kraus & Bros.*, 2 Cir., 149 F. 2d 773, 774, certiorari granted *M. Kraus & Bros. v. United States*, 66 S. Ct. 740, it seems that we are without jurisdiction to consider the objection of unconstitutionality for vagueness and ambiguity. In an effort to obtain uniformity in the application of the Act, Congress established a procedure by which a person affected may first protest to the Emergency Price Administrator and thereafter test the validity of any regulation, order, or price schedule by filing suit in the specially constituted Emergency Court of Appeals, with final review accorded upon petition of certiorari to the Supreme Court. 50 U. S. C. A. Appendix, §§923(a), 924(a), 924(d). In *Yakus v. United States*, 321 U. S. 414, the Supreme Court conclusively determined that the invalidity of a regulation on grounds of arbitrary and capricious operation may not be raised as a defense in a criminal proceeding. Though the Court left open the present



question of unconstitutionality disclosed upon the face of the regulation, Congress thereafter amended the Act so as to provide an additional remedy in criminal cases.<sup>1</sup> As the Act now stands, an accused in a criminal proceeding may make timely application to the court for leave to file a complaint in the Emergency Court of Appeals challenging the validity of the regulation. 50 U. S. C. A. Appendix, §924(e), added June 30, 1944, and amended June 30, 1945. The court in which the proceeding is pending must grant leave if it finds that the defendant is acting in good faith and there is "reasonable and substantial excuse" for his failure to take advantage of the protest proceeding provided by the original act. Congress adopted this amendment with the express purpose of eliminating any question of due process in the situation now presented; and we think it has succeeded in doing so. The defendants here, having neither employed the protest proceeding nor applied for a determination of the issue by the Emergency Court of Appeals, cannot now raise the invalidity of the regulation. *Old Monastery Co. v. United States*, 4 Cir., 147 F. 2d 905, affirming *United States v. Renken*, D. C. W. D. S. C., 55 F. Supp. 1; *Taylor v. United States*, 9 Cir., 142 F. 2d 808, certiorari denied 323 U. S. 723.

The regulation here particularly involved is the "evasion" section of Maximum Price Regulation 426, which prohibits evasion of the stated price limitations, "whether by direct or indirect methods, in connection with any offer,

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1 See the remarks of Senator Danaher, 90 Cong. Rec. 5305, where he quotes the sentence reserving this issue in the *Yakus* case and then says: "But in what we have done we have perfected the two points as to which the Supreme Court had entered no decision, to the end that there can be no question of the denial of or the existence of due process. Thus we afford a remedy which is a complete answer in both these respects, because we give the citizen time within which he can file the protest." See also the remarks of Senator Wagner, 90 Cong. Rec. 5289, and, more generally, 90 Cong. Rec. 5300-5306, 5365-5375.

solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise.”<sup>2</sup> The information charged that the defendants on three specified dates evaded the maximum price regulation by compelling J. M. Fierro and William Zwerdling to purchase unrationed and undesired commodities as a condition to the purchase of a rationed item. Defendants insist that the information failed to allege a crime, since the nominal charge for the lettuce was the maximum price and the unrationed items were sold at ceiling. That such a sale nevertheless constitutes a tying-agreement under the regulation was determined by this court in *United States v. M. Kraus & Bros., supra*; and this has been the uniform view of the district courts. *United States v. Armour & Co. of Delaware*, D. C. Mass., 50 F. Supp. 347; *Brown v. Banana Distributors of Connecticut*, D. C. Conn., 52 F. Supp. 804; *Bowles v. Cudahy Packing Co.*, D. C. W. D. Pa., 58 F. Supp. 748. We can see no reason to depart from our earlier decision. A rationed item cannot be said to be actually sold at ceiling when, although the price quoted on it is the maximum legal price, there is at the same time an enforced sale of an unrationed commodity. It seems obvious to us, as it certainly would to the consuming public, that when a customer who desires to obtain lettuce must buy honeydew melons, broccoli, or celery in order to get it, he gives a consideration above and beyond that fixed by the maximum price regulation.

A mere reading of the information indicates the absence of merit in defendants’ further contention that it was not

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<sup>2</sup> Sec. 11 of Art. I of Sec. 1439.3 of Maximum Price Regulation 426.

sufficiently detailed. They were informed of the factual basis of the claim, so that they could adequately prepare a defense; and any judgment in the present suit would constitute a bar to double jeopardy in another. *United States v. Fried*, 2 Cir., 149 F. 2d 1011; *United States v. Achtner*, 2 Cir., 144 F. 2d 49.

Defendants next contend that the evidence failed to prove the government's case beyond a reasonable doubt. Questions of credibility were of course for the jury; and, as we have had occasion to point out so often lately, our task is not to discover evidence convincing beyond a reasonable doubt, but rather to ascertain whether there was basis for the jury's conclusion. *United States v. Kushner*, 2 Cir., 135 F. 2d 668, certiorari denied *Kushner v. United States*, 320 U. S. 212; *United States v. Greenstein*, 2 Cir., Jan. 28, 1946, citing many of our recent cases. The information was in three counts, each charging both of the defendants with the sale to Fierro on November 17, 1943, of 10 boxes of honeydew melons as a condition of the sale of 4 crates of lettuce; to Fierro on November 19, 1943, of 5 boxes of broccoli as a condition of the sale of 5 crates of lettuce; and to Zwerdling on November 27, 1943, of 5 crates of celery as a condition of the sale of 5 crates of lettuce. Concerning the first sale, Fierro testified that Simon told him, "If you want any melons I will try to squeeze you out a few [lettuce]." "Take melons, I will give you lettuce. If you don't take no melons, I haven't got no lettuce." The evidence as to the other two sales was substantially the same; and the bills of sale introduced by the government indicated that simultaneous sales were made. To refute this evidence, defendants point to possible selfish motives which might have let Fierro and Zwerdling to testify as they did; to what they assert to be the circumstantial improbability of the sale of honeydew melons and lettuce at



the same time, since they were ordinarily sold from different places; to the failure of Fierro and Zwerdling to complain to the management of the corporation. But these attacks on the prosecution witnesses were for the jury; in the light of their direct testimony, the verdict clearly must stand against this appeal. Much is made of some hesitancy in their testimony. The jury presumably considered this natural in view of their obvious unwillingness to testify and their fear of losing future credit with wholesalers.

The corporate defendant makes a separate contention that the guilt of its salesman is not to be attributed to it. But the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment, *New York Cent. & H. R. R. Co. v. United States*, 212 U. S. 481; and the state and lower federal courts have been consistent in their application of that doctrine. *Zito v. United States*, 7 Cir., 64 F. 2d 772; *C. I. T. Corp. v. United States*, 9 Cir., 150 F. 2d 85; *Mininsohn v. United States*, 3 Cir., 101 F. 2d 477; *Egan v. United States*, 8 Cir., 137 F. 2d 369, certiorari denied 320 U. S. 788; *United States v. Arrow Packing Corp.*, 2 Cir., Jan. 29, 1946. See also *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.*, [1944] 1 K. B. 146; *Moore v. I. Bresler, Ltd.*, [1944] 2 All. E. R. 515, discussed in 19 Aust. L. J. 51; *Chuter v. Freeth & Pocock, Ltd.*, [1911] 2 K. B. 832; the articles, *Corporations and the Criminal Law*, 11 Sol. 101; *Criminal Liability of Corporations*, 88 Sol. J. 97, 139; and the full discussion of corporate responsibility under the penalty provisions of the Act, *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 274, 54 N. E. 2d 210, 219.

No distinctions are made in these cases between officers and agents, or between persons holding positions involving

varying degrees of responsibility. And this seems the only practical conclusion in any case, but particularly here, where the sales proscribed by the Act will almost invariably be performed by subordinate salesmen, rather than by corporate chiefs, and where the corporate hierarchy does not contemplate separate layers of official dignity, each with separate degrees of responsibility. The purpose of the Act is a deterrent one; and to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion. Here Simon acted knowingly and deliberately and hence "wilfully" within the meaning of the Act, *Zimberg v. United States*, 1 Cir., 142 F. 2d 132, 137, 138, certiorari denied 323 U. S. 712, and his wilful act is also that of the corporation. *United States v. Union Supply Co.*, 215 U. S. 50, 55; *United States v. Illinois Cent. R. Co.*, 303 U. S. 239.

Judgment affirmed.





No. 11,147

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

COFFIN REDINGTON COMPANY

(a corporation),

vs.

*Appellant,*

CHESTER BOWLES, Administrator, Office of  
Price Administration,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

**APPELLANT'S REPLY BRIEF.**

---

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FILED

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No. 11,147

IN THE

# United States Circuit Court of Appeals

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(a corporation),

*Appellant,*

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Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

## APPELLANT'S REPLY BRIEF.

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### ARGUMENT.

#### INTRODUCTION.

Before discussing the efforts of the Administrator to refute the Company's specifications of errors, we believe it fitting to comment briefly upon his unmistakable plea to this Court for a gracious reception of his case.

On page 6 of brief for appellee, there is a quotation from the opinion in *Bowles v. Stafford*, 56 Fed. Supp. 976: "This type of case is difficult of proof by the Administrator." That terminology was employed

in contrasting a tying-agreement complaint with the more common price-ceiling complaint (pages vii and viii in Appendix of appellant's opening brief). The Administrator has at his disposal all necessary investigators and attorneys, and he has full authority to subpoena any and all records desired. If the Company had actually violated the Maximum Price Regulation, as charged, the proof would not have been difficult. If in this proceeding the Administrator, after reviewing the record, has found any difficulty of proof, should he not begin seriously to question his original predetermination of the Company's guilt?

On page 7 of brief for appellee, there is the obvious attempt to lessen the Administrator's burden of proving a tying agreement by the improvisation of an artificial distinction between the terms "compelling" or "forcing" a commodity on a buyer and a "must" proposition with reference to the buyer. This matter will be more fully discussed under second specification of error, post.

Finally, on pages 7 and 11, respectively, of brief for appellee, this Court is asked to look beyond the record in an effort to find the non-existent: "It is therefore necessary that the obvious reluctance of plaintiff's witnesses to testify against the defendant be borne in mind in analyzing the evidence presented to the trial court so that the same may be correctly interpreted."; "That these witnesses were hostile to the Government (for the economic reasons previously stated) is beyond question." There is nothing in the record to indicate that the Administrator's witnesses

were reluctant or hostile; on the contrary, the record discloses that they answered the questions of Administrator's counsel with readiness and willingness, however disappointing their answers may have been to him. *Counsel* may have been reluctant to question them further and may have been hostile toward the witnesses when their testimony was given, but *his* personal feelings should not be imputed to the witnesses.

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FIRST SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 4 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD DISTILLED SPIRITS AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

The Administrator concedes the correctness of the Company's position:

"It was stipulated between the parties at the trial that \* \* \* none of the individual commodities were sold at a price in excess of ceiling price for each such commodity (R. 26-27)". (Brief for Appellee, pages 2 and 3).

SECOND SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 5 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY OTHER BEVERAGES AND THEREBY HAD SOLD WHISKEY AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

Paragraph 5 of the complaint charged that the Company sold whiskey only on condition that the purchaser also buy other commodities and thereby sold whiskey at over-ceiling prices (R. 3). In order for the Administrator to substantiate this allegation, he was required to prove, first, that there was a tying agreement, and second, that the tying agreement was illegal in that it required the purchaser to pay more than the ceiling price of the whiskey for the whiskey and other commodities.

*Edelmann v. Bonded Liquors, Inc.* (cited on page 4 of brief for appellee):

“From the foregoing, the Court concludes that the provisions above quoted forbidding evasions of the regulations prohibit the practice here involved, by which a seller, in effect, compels the purchase of one commodity as a condition of the sale of another product for which a ceiling price has been established, and by which the seller demands a *total price for both above the price established for the commodity regulated.*” (Emphasis supplied.)

*Brown v. Banana Distributors*, 52 F. Supp. 804 (cited on page 4 of brief for appellee):

“Any type of tying agreement is a violation of the act *if used as a means of evasion* of the maxi-



imum price allowed by the maximum price regulation, but *it must be made to appear that the practice is so used* in order to set up a valid charge of violation of the act. \* \* \* *It is the evasion of maximum prices, not the method, which is prohibited by this section.*" (Emphasis supplied.)

Assuming, for the sake of argument, but not conceding, that the Administrator had been able to prove the existence of a tying agreement, there still is no evidence in the record tending to prove that such agreement was illegal—that any retailer paid more than the whiskey ceiling price for the whiskey and other commodities that he purchased. The Administrator failed to produce any evidence as to the ceiling price of whiskey or as to the aggregate sales price of the whiskey and other commodities. Under these circumstances, there could be no possible finding of a sale of whiskey over its legal ceiling price. We submit that, upon this single point, the finding of the trial court set forth in the second specification of error must fall.

In this connection, the statement of the Administrator on page 2 and again on page 14 of brief for appellee, to the effect that the parties stipulated at the trial that the total price charged for the whiskey and the other commodities exceeded the maximum price permissible for the whiskey, does not conform to the facts. An examination of pages 26 and 27 of the record (claimed by the Administrator to support his statement) reveals that the only stipulation made or

intended was to the effect that each commodity sold was sold *within* its ceiling.

Without in any way relinquishing our position that the Company's second specification of error is well taken for the reason stated above, we pass to the next point which the Administrator was required to prove in order to justify the finding made with reference to paragraph 5 of the complaint, viz., that there was a tying agreement.

What is a "tying agreement"? Paragraph 5 of the complaint alleges that the Company sold whiskey "only on condition" that the purchaser also buy other commodities. This allegation is based upon Section 7.8 (b) of Maximum Price Regulation No. 445 (reproduced verbatim on page 2 of brief for appellee), which, without defining same, condemns an evasion of price ceilings by "tying agreement".

In *U. S. v. Armour & Co.*, 50 Fed. Supp. 347, the indictment alleged that the defendants sold butter "and as a condition of the sale of said butter the defendant did unlawfully, knowingly and wilfully demand, require and compel" purchasers to buy another commodity. The court stated:

"It is, therefore, my opinion that a tying agreement, by which a seller 'demands, requires and compels' the purchase of one commodity as a condition of the sale of another product \* \* \* is an evasion."

In *Brown v. Banana Distributors*, 52 Fed. Supp. 804, the term "tying agreement" was used in the sense of "compulsion to purchase another commodity

with the regulated commodity” and “refusal to sell the regulated commodity except in conjunction with the other commodity.”

In *Bowles v. Stafford*, 56 Fed. Supp. 976, where a tying agreement was alleged, the theory of the Administrator was that the purchase of one item was “required” by the seller.

Similarly, in *Edelmann v. Bonded Liquors, Inc.*, quoted by the Administrator on page 5 of his brief, the court said that the plaintiff in order to obtain whiskey was “required” to purchase another commodity.

Since it is charged that, by tying agreement, the Company sold whiskey only on condition that the purchaser also buy another commodity, it follows that it is incumbent upon the Administrator to prove that the purchaser was required or compelled or forced to buy the other commodity. At no time during the trial did the Administrator attempt to escape his rightful burden of showing “compulsion” or “force” and, now that the record is before this Court and contains nothing to substantiate “compulsion” or “force”, he asks to be relieved of that burden—he pleads (page 7 of brief for appellee) that “ \* \* \* the word ‘force’ when here used has a different connotation than that normally given it”. The Administrator, having made a charge, should be required to substantiate it.

The Administrator concedes that there was no evidence that the Company’s salesmen expressly in-

formed their customers of the terms of the alleged tying agreements (pages 7 and 8 of brief for appellee). The failure of counsel for the Administrator to prove the contrary has required the Administrator's special appellate attorney to hazard various explanations—"economic background", "innuendo". These explanations are as theoretical as is the Company's alleged violation of the Maximum Price Regulation.

There is set forth in the appellant's opening brief a concise but accurate statement of the economic situation prevailing during the year 1944. The Company, by reason of its tremendous drug business, was not required to realize financially upon its lesser liquor business. Retailers could purchase liquor from some thirty competing wholesalers in the San Francisco Bay area, and it was important that the Company maintain the goodwill of its retailers. The rationing plan instituted by the Company applied to all of the commodities mentioned in the record, whether whiskey or otherwise; the plan was conceived and executed for the benefit of the retailers; the plan provided for new customers as well as old (this fact does not appear in the record because the occasion did not arise for a question to which it would have been responsive; however, the Administrator purports to argue to the contrary on page 6 of brief for appellee and we volunteer the statement to preclude the possibility that our silence be misconstrued).

The "force by innuendo" theory advanced by the Administrator on pages 8 through 11 of brief for appellee is apparently an innovation to Anglo-Ameri-



can jurisprudence. Under this proffered doctrine, the ancient art of salesmanship is revolutionized: the retailer must initiate the selling transaction; the wholesaler is not permitted to suggest items of merchandise; the trained salesman who has learned his stock and his retailer's requirements is replaced with a robot order-taker; for the wholesaler and his salesman to conduct themselves otherwise would be to submit themselves to the "force by innuendo" weapon. We do not believe that the time has yet arrived when the wholesaler cannot lawfully *sell* his products to the retailer. We believe that the wholesaler still has the right to offer all or any portion of his stock to the retailer, to suggest commodities which he believes the retailer can sell to the public, to mention one commodity before mentioning another. We conclude that, if there is to be any allusion to the term "innuendo" it should be confined to the arguments appearing in brief for appellee.

The final, futile attempt by the special appellate attorney to support the charge of the Administrator is found on page 11 of brief for appellee. The surprising statement is made that three of the Administrator's witnesses "admitted while testifying that they had previously given signed statements \* \* \* to the effect that they had purchased liquor items other than whiskey from the defendant in order to be able to obtain whiskey." We have searched the record in vain to find the basis for the foregoing assertion. One witness, Mrs. Parker, testified that she signed "something" (R. 32) but she did not testify as to the con-



tents of the "something". The testimony of another witness, Mr. Ferroni, does not even disclose that he made a prior statement, inconsistent or otherwise (R. 38-9). The third witness, Mr. Lasser, testified that he signed a statement referring to a wholesaler *other than the Company* (R. 56-7). We submit that the Administrator's brief-writer has taken unwarranted liberties with the truth in making the foregoing assertion.

In view of the fact that no witness did testify that he had made a prior inconsistent statement, there is little reason to discuss the material contained in the footnote on page 13 of brief for appellee, where the comment is made that there is a growing tendency among the courts to treat the admission of a witness on the stand, to the effect that he has made a prior statement outside of court which is inconsistent with his testimony in court, as substantive evidence of the truth of the prior inconsistent statement. Suffice it to say that counsel for the Administrator does not claim this to be the governing rule; nor could he properly do so, for proof of inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matter stated:

*Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030;

70 *Corpus Juris* 1153.

It should be noted that, in the case cited by the Administrator, *Di Carlo v. United States*, 6 F. (2d) 364, the court was merely confirming the rule that a party

should be allowed to impeach his own witness, and the portion of the opinion quoted was simply the court's answer to the reasons usually advanced for not allowing such practice and the court's recognition of the danger of a jury accepting as true the very same facts as the Administrator is asking this Court to consider.

On page 13 of brief for appellee, a studied effort is made to cast doubt upon the ability of retailers to return commodities purchased from the Company. One retailer particularly testified that she knew that she could make the returns (R. 34). The Manager of the Liquor Division (R. 85-6) and the Vice President in charge of the Drug Division (R. 106) testified that many returns had actually been made by retailers. Plaintiff's Exhibit No. 2, a memorandum of August 4, 1944, directed to the salesmen in the Drug Division, informed them that unrestricted items (items on the "open list") were never to be sent to retailers arbitrarily and that, with reference to restricted items which had been sent to retailers on the allocation basis, they could be returned if desired (R. 112). Plaintiff's Exhibit No. 3, a similar memorandum of June 22, 1944, to which the Administrator has alluded (page 13 of Brief for Appellee), is not in conflict with the foregoing; had trial counsel seen fit to question the author of the memorandum (Mr. H. J. Haaf, who was available in court), he would have been apprised of the full and complete State Board of Equalization ruling and would have discovered that it applied only to *final* sales of liquor—not to sales made *on approval*, as was the case with the liquor offered by allocation to customers of the Drug Division.

**CONCLUSION.**

In this injunction proceeding, the burden was upon the Administrator to establish the Company's alleged violation; the evidence of the Administrator was required to be clear, undisputed, convincing:

*Bowles v. Cohn*, 57 F. Supp. 306 at 307.

The evidence demonstrates that no commodity was sold above its individual ceiling price, and that no commodities were the subjects of a tying agreement. There is no evidence to show that any retailer paid more, for whiskey and other commodities, than the ceiling price of the whiskey.

Therefore, we respectfully ask this Court to reverse the judgment of the District Court and to render final judgment in favor of the Company.

Dated, San Francisco, California,

April 1, 1946.

LOUIS S. BEEDY,

JOHN BENNETT KING,

THOMAS, BEEDY, NELSON & KING,

*Attorneys for Appellant.*

No. 11150

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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EUGENE E. RITCH and A. W. HALL,  
Appellants,  
vs.

PUGET SOUND BRIDGE & DREDGING CO.,  
INC., a corporation, JOHN A. RUMSEY, a  
sole trader doing business as Rumsey & Co.,  
together doing business as Rumsey Puget  
Sound, a copartnership,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division

FILED  
NOV 27 1945  
PAUL P. O'BRIEN,  
CLERK





No. 11150

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United States  
Circuit Court of Appeals  
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Upon Appeals from the District Court of the United States  
for the Western District of Washington,  
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Dexter Horton Building  
Seattle, Washington.

J. CHARLES DENNIS,

Attorney for Appellees,  
1012 U. S. Court House  
Seattle, Washington [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.



In the United States District Court for the Western  
District of Washington, Northern Division.

No. 970

EUGENE E. RITCH and A. W. HALL,  
Plaintiffs,  
vs.

PUGET SOUND BRIDGE & DREDGING CO.  
INC., a Corporation, and JOHN A. RUMSEY,  
a sole trader doing business as RUMSEY &  
CO., together doing business as RUMSEY  
PUGET SOUND, a co-partnership,  
Defendants.

### COMPLAINT

Come now the plaintiffs and for cause of action  
against the defendants allege as follows:

#### I.

That at all times herein mentioned, the defendant  
Puget Sound Bridge & Dredging Co., Inc., was  
and now is a corporation organized and doing busi-  
ness under the laws of the State of Washington,  
and the defendant John A. Rumsey was and now  
is a sole trader doing business as Rumsey & Co.,  
and that said corporation and said sole trader have  
been and are doing business as a copartnership  
under the name of Rumsey Puget Sound, engaged  
in constructing Pier No. 3 at the Puget Sound  
Navy Yard, Bremerton, Washington, under con-  
tract with the United States Navy Department.

II.

That in the months of January to August, 1942, the defendants employed John C. Earles as a warehouse clerk in the regular course of said construction work upon said Pier No. 3. That his duties were the receiving and checking and otherwise handling [2] of intra-state and inter-state shipments of materials, storing the same in the warehouse and routing them to final disposition.

III.

That at all times herein mentioned there was and now is in full force and effect an Act of the Congress of the United States known as the Fair Labor Standards Act of 1938, which provides for the payment of overtime pay at the rate of time and one-half for all time worked in excess of forty hours in any one week, to be paid to workers engaged in inter-state commerce or in the production of goods for commerce between the states or from any state to any place outside thereof.

IV.

That at all times herein mentioned, the said John C. Earles, employed as a warehouse clerk as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for

overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said John C. Earles in the sum of \$121.10, no part of which has been paid, although due demand has been made therefor.

#### V.

That said Fair Labor Standards Act of 1938 further provides, in Section 16 (b) thereof, that any employer who so violates the provisions of said Act shall be liable to any employee affected in the amount of the unpaid overtime compensation and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of the [3] action. That the sum of \$100.00 is a reasonable attorney's fee on said claimant's cause of action.

#### VI.

That the said John C. Earles has in writing assigned his said cause of action to the plaintiffs herein.

And for a Second Cause of Action against the defendants, plaintiffs complain and allege as follows:

#### I.

Repeat and re-allege as though fully set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of January 12, 1941 and May 1, 1942, the defendants employed A. W. Hall as an office draftsman and engineer, designing and detailing railroad systems, shipways and piping systems for said Pier 3 and supervising other office draftsmen in similar work, likewise frequently checking in special materials for the material man, all in the regular course of the construction work upon said pier.

III.

That at all times herein mentioned, the said A. W. Hall, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said A. W. Hall in the sum [4] of \$407.32, no part of which has been paid although due demand has been made therefor.

IV.

That the sum of \$350.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

## V.

That the said A. W. Hall has in writing assigned his said cause of action to the plaintiffs herein.

And for a Third Cause of Action against the defendants, plaintiffs complain and allege as follows:

## I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

## II.

That between the dates of August 5, 1941 and July 6, 1943, the defendants employed John W. Jameson as head timekeeper, checking time and figuring weekly pay of employees engaged in inter-state commerce or in the production of goods for inter-state commerce and likewise hiring employees through their different unions, all in the regular course of the construction work upon said pier.

## III.

That at all times herein mentioned, the said John W. Jameson, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime [5]



work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said John W. Jameson in the sum of \$882.37, no part of which has been paid although due demand has been made therefor.

IV.

700.00

That the sum of \$350.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

V.

That the said John W. Jameson has in writing assigned his said cause of action to the plaintiffs herein.

And for a Fourth Cause of Action against the defendants, plaintiffs complain and allege as follows:

I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of January 2, 1942 and May 31, 1943, the defendants employed Ralph O. Lund as an office draftsman, designing and detailing facilities for two buildings and the Personnel Shelter and assisting with final plans on all projects in the regular course of the construction work upon said Pier No. 3.

## III.

That at all times herein mentioned, the said Ralph O. Lund, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked [6] a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said Ralph O. Lund in the sum of \$483.99, no part of which has been paid although due demand has been made therefor.

## IV.

That the sum of \$400.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

## V.

That the said Ralph O. Lund has in writing assigned his said cause of action to the plaintiffs herein.

And for a Fifth Cause of Action against the defendants, plaintiffs complain and allege as follows:

## I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause

of action and all except the last sentence of paragraph V thereof.

## II.

That between the dates of May 11, 1941 and April 13, 1943, the defendants employed Henry I. Mayer as a timekeeper, engaged in checking time and figuring payrolls of employees who handled materials shipped in intra-state and inter-state commerce.

## III.

That at all times herein mentioned, the said Henry I. Mayer, employed as aforesaid was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked [7] a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said Henry I. Mayer in the sum of \$978.49, no part of which has been paid although due demand has been made therefor.

## IV.

That the sum of \$750.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

## V.

That the said Henry I. Mayer has in writing assigned his said cause of action to the plaintiffs herein.

And for a Sixth Cause of Action against the defendants, plaintiffs complain and allege as follows:

## I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

## II.

That between the dates of July 13, 1941 and March 30, 1943, the defendants employed Paul Mehner as an office draftsman, detailing plans for railroads, piping facilities and shipways for said Pier 3, all in the course of the construction work upon said pier.

## III.

That at all times herein mentioned, the said Paul Mehner, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the [8] terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and

by reason thereof the defendants became indebted to the said Paul Mehner in the sum of \$486.60, no part of which has been paid although due demand has been made therefor.

IV.

That the sum of \$400.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

V.

That the said Paul Mehner has in writing assigned his said cause of action to the plaintiffs herein.

And for a Seventh Cause of Action against the defendants, plaintiffs complain and allege as follows:

I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of April 29, 1942 and June 1, 1943, the defendants employed Esther O. Owens as a clerk-stenographer, her duties consisting of typing up purchase orders and checking invoices on materials purchased and shipped in intra-state and inter-state commerce for use in the regular course of the construction work upon said Pier No. 3.

III.

That at all times herein mentioned, the said



Esther O. Owens, employed as aforesaid, was engaged in inter-state commerce [9] or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms of said Act, and that she regularly worked a total of forty-eight hours weekly or more, but that her employers, the defendants, compensated her for her overtime work at a rate which was less than one and one-half times the regular rate at which she was employed, and by reason thereof the defendants became indebted to the said Esther O. Owens in the sum of \$149.73, no part of which has been paid although due demand has been made therefor.

#### IV.

That the said sum of \$120.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

#### V.

That the said Esther O. Owens has in writing assigned her said cause of action to the plaintiffs herein.

And for An Eighth Cause of Action against the defendants, plaintiffs complain and allege as follows:

#### I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of August 19, 1941 and May 31, 1943, the defendants employed Eugene E. Ritch as a material man, whose duties were the issuance of purchase orders and the checking in of materials purchased and shipped in both intra-state and interstate commerce under the supervision of the superintendent and resident engineer in charge of the construction work upon said Pier No. 3 and in the regular course of such construction work.

III.

That at all times herein mentioned, the said Eugene E. Ritch, employed as aforesaid, was engaged in inter-state commerce [10] or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said Eugene E. Ritch in the sum of \$662.20.

V.

That the sum of \$550.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

## VI.

That the said Eugene E. Ritch has in writing assigned his said cause of action to the plaintiffs herein.

And for a Ninth Cause of Action against the defendants, plaintiffs complain and allege as follows:

## I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of Paragraph V thereof.

## II.

That between the dates of June 1, 1942 and December 31, 1943, the defendants employed James P. Ritch as a warehouse clerk, receiving, checking, storing and routing materials shipped in intra-state and inter-state commerce for use in the regular course of the construction work upon said Pier No. 3.

## III.

That at all times herein mentioned, the said James P. Ritch, employed as aforesaid, was engaged in inter-state commerce [11] or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-

half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said James P. Ritch in the sum of \$75.00, no part of which has been paid although duly demanded.

V.

That the sum of \$70.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

VI.

That the said James P. Ritch has in writing assigned his said cause of action to the plaintiffs herein.

And for a Tenth Cause of Action against the defendants, plaintiffs complain and allege as follows:

I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of December 1, 1940 and August 31, 1943, the defendants employed Effie M. Robinson as a bookkeeper, making all payroll checks, auditing all invoices, putting all invoices through for payment, keeping all necessary book-keeping records in connection with the contract for and the execution of the construction of said Pier No. 3, the said invoices covering materials shipped in inter-state and intra-state commerce, and the

said payroll checks being made to employees engaged in both intra-state and inter-state commerce.

### III.

That at all times herein mentioned, the said Effie M. Robinson, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that she regularly worked a total of forty-eight hours weekly or more but that her employers, the said defendants, compensated her for her overtime work at a rate which was less than one and one-half times the regular rate at which she was employed, and by reason thereof the defendants became indebted to the said Effie M. Robinson in the sum of \$257.49, no part of which has been paid although due demand has been made therefor.

### IV.

That the sum of \$210.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

### V.

That the said Effie M. Robinson has in writing assigned her said cause of action to the plaintiffs herein.

And for An Eleventh Cause of Action against the defendants, plaintiffs complain and allege as follows:



I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

II.

That between the dates of April 19, 1942 and May 18, 1943, the defendants employed William J. Sheffield as an assistant timekeeper, checking time and figuring payroll of employees who handled materials shipped and received in intra-state and inter-state [13] commerce and also receiving and checking in certain materials received in such commerce in the regular course of the construction work upon said Pier No. 3.

III.

That at all times herein mentioned, the said William J. Sheffield, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms of said Act, and that he regularly worked a total of forty-eight hours or more weekly, but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof the defendants became indebted to the said William J. Sheffield in the sum of \$289.54, no part of which has been paid although due demand has been made therefor.

## IV.

That the sum of \$250.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

## V.

That the said William J. Sheffield has in writing assigned his said cause of action to the plaintiffs herein.

And for a Twelfth Cause of Action against the defendants, plaintiffs complain and allege as follows:

## I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof.

## II.

That between the dates of April 22, 1941 and May 18, 1943, the defendants employed Glenn E. Tyler as a field engineer [14] and draftsman engaged in drafting and detailing the plans for Pier No. 3 and shipway facilities and in installation of railroad systems and shipways on and about said pier in the regular course of the construction thereof.

## III.

That at all times herein mentioned, the said Glenn E. Tyler, employed as aforesaid, was engaged in inter-state commerce or in the production of goods for commerce between the state or from the State of Washington to places outside thereof

under the terms and definitions of said Act, and he regularly worked a total of forty-eight hours weekly or more but that his employers, the said defendants, compensated him for his overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof, the defendants became indebted to the said Glenn E. Tyler in the sum of \$561.41, no part of which has been paid although due demand has been made therefor.

IV.

That the sum of \$450.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

V.

That the said Glenn E. Tyler has in writing assigned his said cause of action to the plaintiffs herein.

And for a Thirteenth Cause of Action, plaintiffs complain and allege as follows:

I.

Repeat and re-allege as fully as though set forth herein paragraphs I and III of their first cause of action and all except the last sentence of paragraph V thereof. [15]

II.

That between the dates of April 6, 1941 and May 22, 1942, the defendants employed A. W. Torn as an office draftsman, designing and detailing facili-

ties for Pier No. 3 and its shipways and drawing layout and detail of its railroad and piping systems, all in the regular course of the construction of said pier.

### III.

That at all times herein mentioned the said A. W. Torn, employed as aforesaid, was engaged in interstate commerce or in the production of goods for commerce between the states or from the State of Washington to places outside thereof under the terms and definitions of said Act, and that he regularly worked a total of forty-eight hours weekly or more but that his employers, the said defendants, compensated him for his services in overtime work at a rate which was less than one and one-half times the regular rate at which he was employed, and by reason thereof, the defendants became indebted to the said A. W. Torn in the sum of \$300.51, no part of which has been paid although due demand has been made therefor.

### IV.

That the sum of \$250.00 is a reasonable attorney's fee to be allowed on said claimant's cause of action.

### V.

That the said A. W. Torn has in writing assigned his said cause of action to the plaintiffs herein.

Wherefore, plaintiffs pray for judgment against the defendants, and each of them as follows:

- (1) On their first cause of action for the sum

of \$242.10, together with attorney's fees in the sum of \$100.00 [18]

(2) On their second cause of action in the sum of \$814.64, together with attorney's fees in the sum of \$350.00.

(3) On their third cause of action in the sum of \$1764.74, together with attorney's fees in the sum of \$700.00.

(4) On their fourth cause of action in the sum of \$967.98, together with attorney's fees in the sum of \$400.00.

(5) On their fifth cause of action in the sum of \$1956.98, together with attorney's fees in the sum of \$750.00.

(6) On their sixth cause of action in the sum of \$973.24, together with attorney's fees in the sum of \$400.00.

(7) On their seventh cause of action in the sum of \$299.46, together with attorney's fees in the sum of \$120.00.

(8) On their eighth cause of action in the sum of \$1324.40, together with attorney's fees in the sum of \$550.00.

(9) On their ninth cause of action in the sum of \$150.00, together with attorney's fees in the sum of \$70.00.

(10) On their tenth cause of action in the sum of \$514.98, together with attorney's fees in the sum of \$210.00.



(11) On their eleventh cause of action in the sum of \$579.08, together with attorney's fees in the sum of \$250.00.

(12) On their twelfth cause of action in the sum of \$1122.82, together with attorney's fee of \$450.00.

(13) On their thirteenth cause of action in the sum of \$601.02, together with attorney's fees in the sum of \$250.00.

(14) For plaintiff's costs and disbursements herein to be taxed.

FLORENCE MAYNE

Attorney for Plaintiffs [17]

United States of America,  
State of Washington,  
County of King—ss.

Eugene E. Ritch, being first duly sworn, says: That he is one of the plaintiffs in the above entitled action and is duly authorized to make this verification on behalf of the plaintiffs herein; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

EUGENE E. RITCH

Subscribed and sworn to before me this 13th day of July, 1944.

(Seal)

FLORENCE MAYNE

Notary Public in and for the State of Washington  
residing at Seattle.

[Endorsed]: Filed July 14, 1944. [18]

[Title of District Court and Cause.]

ANSWER

Come now the defendants in the above entitled action by and through their attorney, and in answer to the complaint of the plaintiffs herein, admit, deny and allege as follows:

I.

Defendants admit the allegations contained in paragraph I of plaintiff's First Cause of Action.

II.

Answering paragraph II, defendants admit that John C. Earles was employed as a warehouse clerk in the regular course of construction work on Pier No. 3 at the Puget Sound Navy Yard, Bremerton, Washington; and deny each and every other allegation contained in said paragraph II.

III.

Answering paragraph III, defendants admit that at all times mentioned in the complaint the Act of Congress of the United States known as the Fair Labor Standards Act of 1938 was in full force and effect; and deny each and every other allegation contained in said paragraph III.

IV.

Answering paragraph IV, defendants deny the allegations contained in paragraph IV of the first count of said complaint. [19]

## V.

Answering paragraph V, the defendants deny that the sum of \$50.00 is a reasonable attorney's fee.

## VI.

Answering paragraph VI, the defendants have no knowledge relative to the facts stated therein, and therefore deny the same.

Answering plaintiff's Second Cause of Action:

## I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Second Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

## II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Second Cause of Action.

## III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Second Cause of Action.

## IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Second Cause of Action, and therefore deny the same.

Answering plaintiffs' Third Cause of Action:

## I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Third Cause of Action

save and except as heretofore admitted in paragraph I of the First Cause of Action. [20]

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Third Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Third Cause of Action.

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Third Cause of Action, and therefore deny the same.

Answering plaintiffs' Fourth Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Fourth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Fourth Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Fourth Cause of Action.

IV.

Defendants have no knowledge relative to the

facts stated in paragraph V of plaintiffs' Fourth Cause of Action, and therefore deny the same.

Answering plaintiffs' Fifth Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Fifth Cause of Action save and except as [21] heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Fifth Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Fifth Cause of Action.

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Fifth Cause of Action, and therefore deny the same.

Answering plaintiffs' Sixth Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Sixth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Sixth Cause of Action.



III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Sixth Cause of Action.

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Sixth Cause of Action, and therefore deny the same. [22]

Answering plaintiffs' Seventh Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Seventh Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Seventh Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Seventh Cause of Action.

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Seventh Cause of Action, and therefore deny the same.

Answering plaintiffs' Eighth Cause of Action:

I.

Defendants deny the allegations contained in

paragraph I of plaintiffs' Eighth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

## II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Eighth Cause of Action.

## III.

Defendants deny the allegations contained in paragraphs III and V of plaintiffs' Eighth Cause of Action.

## V.

Defendants have no knowledge relative to the facts stated in paragraph VI of plaintiffs' Eighth Cause of Action, [23] and therefore deny the same.

Answering plaintiffs' Ninth Cause of Action:

## I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Ninth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of action.

## II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Ninth Cause of Action.

## III.

Defendants deny the allegations contained in paragraphs III and V of plaintiffs' Ninth Cause of Action.

## IV.

Defendants have no knowledge relative to the facts stated in paragraph VI of plaintiffs' Ninth Cause of Action, and therefore deny the same.

Answering plaintiffs' Tenth Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Tenth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Tenth Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Tenth Cause of Action. [24]

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Tenth Cause of Action, and therefore deny the same.

Answering plaintiffs' Eleventh Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Eleventh Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Eleventh Cause of Action.

## III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Eleventh Cause of Action.

## IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Eleventh Cause of Action, and therefore deny the same.

Answering plaintiffs' Twelfth Cause of Action:

## I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Twelfth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

## II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Twelfth Cause of Action. [25]

## III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Twelfth Cause of Action.

## IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Twelfth Cause of Action, and therefore deny the same.

Answering plaintiffs' Thirteenth Cause of Action:

I.

Defendants deny the allegations contained in paragraph I of plaintiffs' Thirteenth Cause of Action save and except as heretofore admitted in paragraph I of the First Cause of Action.

II.

Defendants admit the allegations contained in paragraph II of plaintiffs' Thirteenth Cause of Action.

III.

Defendants deny the allegations contained in paragraphs III and IV of plaintiffs' Thirteenth Cause of Action.

IV.

Defendants have no knowledge relative to the facts stated in paragraph V of plaintiffs' Thirteenth Cause of Action, and therefore deny the same.

Wherefore, having fully answered the complaint of the plaintiffs herein, defendants pray that the action be dismissed, and that they may recover their costs herein.

J. CHARLES DENNIS

Attorney for Defendants

Copy received 10-12-44.

FLORENCE MAYNE

Attorney for Plaintiffs

[Endorsed]: Filed Oct. 19, 1944 [26]



[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This Cause coming on regularly for trial in open Court on the 10th day of May, 1945, plaintiffs appearing by their attorney, Florence Mayne, and the defendants appearing by their attorney, J. Charles Dennis, evidence having been introduced and witnesses examined, the Court being fully advised in the premises, now makes the following Findings of Fact:

I.

As to plaintiffs' Second Cause of Action, that A. W. Hall was not engaged in interstate commerce, or in the production of goods for interstate commerce.

II.

As to plaintiffs' Third Cause of Action, that John W. Jameson was not engaged in interstate commerce, or in the production of goods for interstate commerce.

III.

As to plaintiffs' Fourth Cause of Action, that Ralph O. Lund was not engaged in interstate commerce, or in the production of goods for interstate commerce. [27]

IV.

As to plaintiffs' Fifth Cause of Action, that Henry I. Mayer was not engaged in interstate commerce, or in the production of goods for interstate commerce.

V.

As to plaintiffs' Sixth Cause of Action, that Paul Mehner was not engaged in interstate commerce, or in the production of goods for interstate commerce.

VI.

As to plaintiffs' Eleventh Cause of Action, that William J. Sheffield was not engaged in interstate commerce, or in the production of goods for interstate commerce.

VII.

As to plaintiffs' Twelfth Cause of Action, that Glenn E. Tyler was not engaged in interstate commerce, or the production of goods for interstate commerce.

VIII.

As to plaintiffs' Thirteenth Cause of Action, that A. W. Torn was not engaged in interstate commerce, or in the production of goods for interstate commerce.

To all of the foregoing plaintiffs except and their exception is allowed.

Done in open Court this 18th day of May, 1945.

JOHN C. BOWEN

United States District Judge

As Conclusions of Law from the foregoing Findings of Fact, the Court makes the following:

## CONCLUSIONS OF LAW

## I.

That the plaintiffs are not entitled to recover any sums in Causes of Action numbered Second, Third, Fourth, Fifth, Sixth, Eleventh, Twelfth and Thirteenth herein.

Exception allowed plaintiffs.

Done in open Court this 18th day of May, 1945.

JOHN C. BOWEN

United States District Judge

Approved as to form only:

.....

Attorney for Plaintiffs

Presented by:

J. CHARLES DENNIS

Attorney for Defendants

[Endorsed]: Filed May 18, 1945. [28]

---

[Title of District Court and Cause.]

## JUDGMENT AS TO CERTAIN CLAIMS

This Cause coming on regularly for hearing in open Court on the 10th day of May, 1945, plaintiffs appearing by their attorney, Florence Mayne, the defendants appearing by their attorney, J. Charles Dennis, and the defendants and the plaintiffs having stipulated that the plaintiffs herein may have judgment in their favor on the First Cause of Action in the sum of \$181.65, said amount to be

in full for overtime due John C. Earles, together with liquidated damages, and the parties having further stipulated that a reasonable attorney's fee should be fixed by the Court and made a part of said judgment;

And the parties having further stipulated as to the Seventh Cause of Action that the plaintiffs have judgment in the sum of \$224.60, said sum to be in full for overtime due Esther O. Owens, together with liquidated damages, and in addition thereto should have judgment for a reasonable attorney's fee, the same to be fixed by the Court;

And the parties having further stipulated as to the Eighth Cause of Action that the plaintiffs have judgment in the sum of \$993.30, said sum to be in full for overtime [29] due Eugene E. Ritch, together with liquidated damages, and for such further sum as the Court should adjudge to be a reasonable attorney's fee;

And the parties having further stipulated as to the Ninth Cause of Action that the plaintiffs have judgment in the sum of \$112.50, said sum to be in full for overtime due James P. Ritch, together with liquidated damages, and for such further sum as the Court should adjudge to be a reasonable attorney's fee;

And the parties having further stipulated as to the Tenth Cause of Action that the plaintiffs have judgment in the sum of \$386.24, said sum to be in full for overtime due Effie M. Robinson, together with liquidated damages, and for such further sum

as the Court should adjudge to be a reasonable attorney's fee; now therefore, it is hereby

Ordered, Adjudged and Decreed that in accordance with the above stipulation as to said causes of action——

I.

That the plaintiffs herein, as assignees of John C. Earles, do have and recover judgment in their favor and against the defendants in the sum of \$181.65, together with the sum of \$50.00 as attorney's fee.

II.

That the plaintiffs herein, as assignees of Esther O. Owens, do have and recover judgment in their favor and against the defendants in the sum of \$224.60, together with the sum of \$50.00 as attorney's fee.

III.

That the plaintiffs herein, as assignees of Eugene E. Ritch, do have and recover judgment in their favor and against the defendants in the sum of \$993.30, together with the sum of \$175.00 as attorney's fee. [30]

IV.

That the plaintiffs herein, as assignees of James P. Ritch, do have and recover judgment in their favor and against the defendants in the sum of \$112.50, together with the sum of \$50.00 as attorney's fee.

V.

That the plaintiffs herein, as assignees of Effie M. Robinson, do have and recover judgment in



their favor and against the defendants in the sum of \$386.24, together with the sum of \$75.00 as attorney's fee.

It is Further Ordered, Adjudged and Decreed that the plaintiffs do have and recover judgment against the defendants for their costs of this action to be taxed by the Clerk of the Court.

This judgment terminates the above entitled action with respect to the First Cause of Action, the Seventh Cause of Action, the Eighth Cause of Action, the Ninth Cause of Action and the Tenth Cause of Action, solely.

Done in Open Court this 14th day of May, 1945.

JOHN C. BOWEN

United States District Judge.

Approved:

FLORENCE MAYNE

Attorney for Plaintiffs

Approved:

J. CHARLES DENNIS

Attorney for Defendants

Presented by:

J. CHARLES DENNIS

[Endorsed]: May 18, 1945. [31]

United States District Court  
Western District of Washington  
Northern Division

No. 970

EUGENE E. RITCH and A. W. HALL,  
Plaintiffs,

vs.

PUGET SOUND BRIDGE & DREDGING CO.,  
INC., a corporation, and JOHN A. RUMSEY,  
a sole trader doing business as RUMSEY &  
CO., together doing business as RUMSEY  
PUGET SOUND, a co-partnership,  
Defendants.

JUDGMENT

This Cause coming on regularly in open Court on the 10th day of May, 1945, plaintiffs being represented by Florence Mayne, their attorney, and the defendants being represented by J. Charles Dennis, their attorney, a trial having been held on the merits, findings of fact and conclusions of law having been duly signed by the Court and filed with the Clerk of the above entitled Court, now therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs herein recover nothing on their Second Cause of Action, the Third Cause of Action, the Fourth Cause of Action, the Fifth Cause of Action, the Sixth Cause of Action, the Eleventh Cause of Action, the Twelfth Cause of Action and the Thir-

teenth Cause of Action, and as to each of those causes of action that the case be, and the same is hereby dismissed. Exception allowed plaintiffs.

Done in Open Court this 18th day of May, 1945.

JOHN C. BOWEN

United States District Judge

Approved as to form only:

.....

Attorney for Plaintiffs.

Presented by:

J. CHARLES DENNIS

Attorney for Defendants.

[Endorsed]: Filed May 18, 1945. [32]

————

[Title of District Court and Cause.]

### COURT'S DECISION

Florence Mayne, Seattle, Washington, Attorney for Plaintiffs.

W. E. Evenson: Skeel, McKelvy, Henke, Evenson & Ullman; Robert F. Sandall, Seattle, Washington, and

J. Charles Dennis, U. S. Attorney; Herbert O'Hare, Assistant U. S. Attorney, Seattle, Washington, Attorneys for Defendants.

Bowen, District Judge:

Both sides have most exhaustively presented this matter to the Court, both on the facts and the law.

Doubtless the fact is well appreciated by all that the Congress has power to deal with this subject only in so far as it relates to interstate commerce. In enacting the Fair Labor Standards Act, under which this action was brought, Congress was exercising that power given to it under the Commerce Clause of the Constitution to regulate inter-state commerce; and unless plaintiffs' work and that of their assignors affected interstate commerce, their claims [33] for overtime work against defendant are not protected by the Fair Labor Standards Act.

So the right of these plaintiffs, and their assignors involves the inquiry whether the new Navy dock structures they were constructing were to be instruments of commerce and whether or not any materials they were handling were handled by them as a part of the movement of those materials in interstate commerce.

Judge Goddard's decision in the case of Joseph A. Brue et al vs. J. Rich Steers, Inc., et al., decided recently in the Southern District of New York is in its facts almost on all fours with the facts in the case at bar. Judge Goddard in that case has very carefully reasoned the matter out and stated the principles and law applicable to the situation, and I am unable to find any fault with anything he has said.

It is, of course, possible that the law as we now know it might later be changed. Congress might possibly declare more certainly an intention to make the Fair Labor Standards Act apply to such work as these employees were doing. Or conceiv-

ably the United States Supreme Court might change its view of the nature of the instrumentality being here built so as to include it in interstate commerce instrumentalities or so as to include as interstate commerce the services which these plaintiffs were performing in connection with the materials in question; but so far the Congress and the Supreme Court have taken no such action, and this Court at this time has to act in the light of the congressional and judicial authority now known to us.

I am convinced that the dock and dock structures which were being built by these plaintiffs as employees of the defendant were not instrumentalities of commerce, that [34] they were intended only to be a Navy dock for the exclusive use of the United States Navy, and that such dock was not intended to be used by all commercial vessels which might wish to do so in the ordinary course of trade and commerce.

I entertain no doubt that the dock was not to be an instrumentality of commerce. I am convinced that the work done by the plaintiffs and their assignors in connection with the materials which had previously moved in interstate commerce, all of which was done only after the materials came to rest on the premises of the Navy Department in Bremerton, after the materials had completed their movement in interstate commerce, does not affect, relate to, or constitute a part of, the movement in commerce of those materials. It is clear that these plaintiffs did nothing that had any causal connection with, or in any way affected, or related to,



the movement in commerce of these materials. It is true that in certain ways they interested themselves in the materials. Some of the plaintiffs kept track of the materials to see where they went when they were put into the structures that were being built as a part of the dock. One of the plaintiffs or assignors kept a progress map showing the final disposition of the material in the course of construction, and there were various services on the construction work done by various assignors with respect to those materials; but such work as was done by the plaintiff's assignors had no relation to and did not affect the movement of these materials in interstate commerce.

I am not aware of any present judicial authority which upon facts like these here upholds the plaintiffs' claims under the Fair Labor Standards Act, and the announced opinions of the Administrative Office of the Fair Labor Standards Act are against plaintiffs' contentions. The [35] Congress has not expressly provided that the work that these men were doing shall be covered by the Act.

I think the case of *Walling vs. Patton-Tully Transportation Co.*, 134 Fed. 2d 945, is not in point because there it was clear that the facilities which were being constructed were facilities in aid of navigation and commerce along two navigable rivers upon which was hauled much of the nation's general interstate commerce. The facilities there being constructed by the employees claiming the protection of the Act were intended to directly aid the movement of interstate commerce; whereas, as I

have previously observed, in the case at bar the dock structures were for the exclusive use of the United States Navy. They were not for general commerce or for any commerce except the use of the Navy.

There is no judicial precedent and there is no rational basis, sound in law, on which the Court could sustain the contention of the plaintiffs and their assignors in this case.

The question of uniformity among all these employees is, however, a very important thing, and if I had any doubt in the matter as to the legal right of the plaintiffs and their assignors to maintain this action, it certainly would be resolved in favor of them, because I feel all employees, irrespective of union membership or kind of work, whether manual, clerical or professional work, should be treated alike as far as this Act is concerned. I believe the question of uniformity in dealing with the employees in this kind of a case is a matter properly to be considered by the Court, and the Court has considered it, and I emphasize that if I felt that there was any doubt as to the facts or applicable legal principles, that doubt would certainly by the Court be resolved in favor of these plaintiffs and their assignors.

[Endorsed]: May 14, 1945. [36]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Eugene E. Ritch and A. W. Hall, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of May, 1945, with reference to the plaintiffs' second, third, fourth, fifth, sixth, eleventh, twelfth and thirteenth causes of action, dismissing the same.

**FLORENCE MAYNE**

Attorney for Plaintiffs

[Endorsed]: Aug. 14, 1945. [37]

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[Title of District Court and Cause.]

### PRAECIPE AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

The above named plaintiffs do hereby designate the following portions of the record and proceedings in the above entitled cause for inclusion in the record on appeal to the Ninth Circuit Court of Appeals, and request the Clerk to prepare and transmit the same within the time required by law:

1. Complaint (As amended in Open Court)
2. Answer
3. Findings of Fact and Conclusions of Law

4. Judgment
5. Court's Oral Decision
6. Notice of Appeal with Date of Filing
7. This Designation of Portions of Record
8. Statement of Points by Appellant
9. Agreed Statement of Facts

FLORENCE MAYNE

Attorney for Plaintiffs

Copy received 8-29-45.

J. CHARLES DENNIS,

Atty. for Defts.

[Endorsed]: Aug. 29, 1945. [38]

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[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS ON  
APPEAL

The points involved in this appeal are questions of law which will be readily apparent from perusal of the agreed statement of facts.

(1) Were the appellants, timekeepers and draftsmen employed by the respondents under a construction contract with the United States Navy Department for the building of a new pier and dry dock at the Puget Sound Navy Yard, together with some other construction and repair work, engaged in inter-state commerce within the meaning of the Fair Labor Standards Act, either

(a) Because they were working upon an instrumentality of commerce, or,

(b) Because they estimated, checked, handled or in some manner worked upon or with materials purchased and transported from outside the State of Washington?

(2) Were two of the timekeepers, William Sheffield and Henry I. Mayer, in any more favored position than the other six claimants, so far as recovery is concerned, by reason of the fact that they actually, as a part of their duties, received and checked [39] in merchandise arriving on the project from outside the State of Washington?

(3) Was one of the draftsmen, A. W. Hall, even though he might be held to have been engaged in interstate commerce, excluded from the benefits of the Act because he fell under the exception of being engaged in a bona fide executive, administrative or professional capacity? The trial Court did not decide this point because he dismissed the plaintiffs' complaint upon the broader ground that none of the claimants was engaged in interstate commerce.

With reference to the above stated points, it is the contention of the appellants that the Court erred in applying the law to the facts, which were never greatly in dispute, and that the Court interpreted too narrowly the phrase, "engaged in commerce or in the production of goods for commerce," as



used in the Fair Labor Standards Act and interpreted by the Federal Courts.

FLORENCE MAYNE

Attorney for Appellants

Copy received 8-29-45.

J. CHARLES DENNIS

Atty. for Defts.

[Endorsed]: Aug. 29, 1945. [40]

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[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS ON AP-  
PEAL TO THE CIRCUIT COURT OF AP-  
PEALS, NINTH CIRCUIT

It Is Hereby Stipulated and Agreed by and between the parties above named, through their respective counsel, that the following is a full and true summary of the evidence adduced at the trial of the above entitled cause and shall constitute the Statement of Facts on the appeal of the plaintiffs as appellants to the Circuit Court of Appeals, Ninth Circuit, from the Decision, Findings of Fact, Conclusions of Law and Judgment of the Trial Court:

During all the period of time covered by the appellants' complaint, the respondents were engaged in certain new and additional construction work for the United States Navy Department at the Puget Sound Navy Yard in Bremerton, Washington, under Navy Fixed-Fee Cost-Plus Contract No. NOY4446.

The principal part of the construction work was Pier No. 3, a new, permanent, reinforced-concrete repair pier for naval vessels, complete with railroad and crane tracks, tied in with the Navy Yard railroad system and connected with the commercial car landing of the City of Bremerton. At the time of this [41] contract, the City of Bremerton was not served by a commercial railroad except by barges carrying railroad cars across Puget Sound. Tracks were completed on the pier while the job was in progress and ordinary railroad cars of common carriers were used on the tracks to unload materials. The pier under construction was to have oil, water, steam, air and dredging services, the dredging for the purpose of deepening the berths alongside the pier.

Other new construction under the contract included a pumpwell for Dry Dock No. 5, shipways for the building of steel ships and barges, bomb shelter tunnels, bomb proofing for Dry Dock No. 5, a five-acre revetment and fill reclaiming tide lands, with quay wall, and a tool shop with toilet facilities. Additions were an extension to Building 457 and an extension to the existing East End Quay Wall. The only repairs to existing structures were repairs to the pier of the Naval Torpedo Station at Keyport, Washington, a few miles away from the Navy Yard.

All these facilities were intended for the exclusive use of the United States Navy. The only evidence as to the intended use of the new pier itself was the testimony of the Government's witness, Mr. E. C. Jack, who stated that it was not intended to be used as a commercial freight pier, but rather for moor-

ing combat ships undergoing overhaul, commercial freight for use of the United States Government being routed to another pier in the Yard.

The entire project is located on the shores of Puget Sound, a large, navigable body of water extensively used in interstate commerce. The two piers protrude into the waters of the Sound and other construction such as the building of the revetment and fill, the two quay walls, and the deepening of the berths through dredging actually took place in such waters. The Puget Sound Navy Yard is one of the major building and repair yards of [42] the United States Navy.

The construction under the contract was a \$6,000,000 project. Approximately four per cent of the materials used were ordered and received from outside the State of Washington. Most of this came to Bremerton itself, but some went to the warehouse of the defendant in Seattle and was transported to Bremerton as needed.

It was conceded at the trial that all of the workmen and foremen employed by the defendant contractor on the project were paid at the rate of time and one-half for overtime work, with the exception of the claimants represented in this suit and two or three others who had not joined in the action. These claimants were paid at the rate of time and one-tenth for their overtime. This action is for the difference between those pay rates, for liquidated damages, costs and attorney's fees. Five of the original thirteen claims assigned to the appellants herein were settled before trial. As to the other eight

claims, the Court entered judgment of dismissal, from which this appeal is taken. The claimants represented here, with the undisputed amounts of overtime pay due them if all of their contentions are sustained, are as follows:

Cause of Action	Name	Classification	Amount
Second	A. W. Hall	Draftsman	\$380.63
Third	John W. Jameson	Timekeeper	875.69
Fourth	Ralph O. Lund	Draftsman	446.71
Fifth	Henry I. Mayer	Timekeeper	949.92
Sixth	Paul E. Mehner	Draftsman	462.84
Eleventh	Wm. J. Sheffield	Timekeeper	268.84
Twelfth	Glenn E. Tyler	Draftsman	521.26
Thirteenth	A. W. Torn	Draftsman	241.52

These amounts are exclusive of the liquidated damages, costs and attorney's fees claimed by the appellants.

These claimants, represented by appellants, were white-collar workers who did not, with two exceptions, actually have [43] anything to do with the reception of interstate shipments of materials. Those two exceptions were Mr. Henry I. Mayer and Mr. Wm. J. Sheffield, timekeepers who worked on the swing shift and who, because there was no material clerk on that shift during a part of that time, checked in, receipted for and oversaw the unloading of intra-state and inter-state shipments that arrived on the job during their hours of work. No evidence was introduced as to the amounts of such shipments, the claimants testifying that they handled a considerable number of them.

The other timekeeper, Mr. John W. Jameson, had no such direct contact with inter-state shipment of materials but based his claim upon having kept the



time of others who, as he supposed, were engaged in interstate commerce in building the pier and other facilities in and about Puget Sound.

The draftsmen's claim to being connected with inter-state shipments of materials was based on the following: They estimated the amounts of supplies to be ordered and submitted their estimates to the purchasing agent of the respondent company, who placed the order. After the supplies arrived and were in the warehouse, and before their installation, the draftsmen checked the various supplies as to quality and inspected the record as to such materials. All the draftsmen testified to having done such work. Although classified as draftsmen, they did inspection and field engineering work, under supervision of the Superintendent and Resident Engineer. As inspectors they had some direction over the installation of materials. As draftsmen they were supervised by Mr. A. W. Hall, who acted as chief draftsman and in a later period, not included in his own claim, as Assistant Superintendent.

Respondents contended that Mr. A. W. Hall fell under the exemption to the Fair Labor Standards Act, Title 29, Paragraph [44] 213 USCA, exempting from the provisions of the Act any employee engaged in a bona fide executive, administrative or professional capacity.

Respondents' witness, Mr. E. C. Jack, the Government's Resident Engineer on the project, testified from his records that Mr. Hall was employed at first merely as a draftsman and so worked from January 12, 1941 to April 8, 1941. Thereafter,



until May 1, 1942, he became head draftsman and his duties, according to Mr. Jack, became approximately 50% supervisory and 50% designing and drafting. There was no testimony that he was a graduate or professional engineer.

The question as to whether or not Mr. Hall was a bonafide executive, administrative or professional employee was not decided because the Court dismissed all the causes of action on the broader ground that none of the appellants was engaged in interstate commerce, the Court being of the opinion that the pier and its adjuncts were solely for the use of the United States Navy and hence never intended for commerce.

This Stipulation and Agreed Statement of Facts is dated at Seattle, Washington, September 27, 1945.

FLORENCE MAYNE

Attorney for Appellants

J. CHARLES DENNIS

Attorney for Respondents

[Endorsed]: Filed Sept. 27, 1945. [45]

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[Title of District Court and Cause.]

STIPULATION FOR ADDITIONAL TIME FOR  
FILING RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, subject to approval of the Court, that the plaintiffs

above named, appellants on appeal, may have an additional fifteen days, a total of fifty-five days in all, from and after September 22, 1945, within which to transmit and docket the record on appeal to the Circuit Court of Appeals of the Ninth Circuit.

Dated at Seattle, Washington, September 17, 1945.

FLORENCE MAYNE

Attorney for Appellants

J. CHARLES DENNIS

Attorney for Respondents

[Endorsed]: Filed Sept. 18, 1945. [46]

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[Title of District Court and Cause.]

ORDER ALLOWING ADDITIONAL TIME FOR  
FILING RECORD ON APPEAL

It appearing that the parties have stipulated, through their respective counsel, subject to the approval of the above entitled Court, that the plaintiffs above named appellants on appeal, may have an additional fifteen days from and after September 22, 1945, within which to transmit and docket their record on appeal.

Now, Therefore, It Is Ordered that the plaintiffs above named, appellants on appeal, may have until the 8th day of October, 1945, to transmit the record on appeal in this cause and docket the same in the Circuit Court of Appeals of the Ninth Circuit.

Done in Open Court September 18, 1945.

JOHN C. BOWEN

Judge

Approved:

J. CHARLES DENNIS

U. S. Attorney

Presented by:

FLORENCE MAYNE

Attorney for Appellants

[Endorsed]: Filed Sept. 18, 1945. [47]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 47, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the final judgment of said United States District Court for

the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [48]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return	
108 folios at 15c.....	\$16.20
33 folios at 05c.....	1.65
Appeal fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record..	.50
<hr/>	
Total .....	\$23.35

I further certify that the above fees, in the sum of \$23.35, have been paid to me by the attorney for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 29 day of September, 1945.

[Seal]

MILLARD P. THOMAS,  
Clerk  
By PERCY MADDUX  
Deputy

[Endorsed]: No. 11150. United States Circuit Court of Appeals for the Ninth Circuit. Eugene E. Ritch and A. W. Hall, Appellants, vs. Puget Sound Bridge & Dredging Co., Inc., a Corporation, John A. Rumsey, a sole trader doing business as Rumsey & Co., together doing business as Rumsey Puget Sound, a Copartnership, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 4, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**EUGENE E. RITCH and A. W. HALL,**      *Appellants,*  
**vs.**

**PUGET SOUND BRIDGE & DREDGING Co., INC., a corporation; JOHN R. RUMSEY, a sole trader doing business as Rumsey & Co., together doing business as Rumsey Puget Sound, a copartnership,** *Appellees.*

---

**UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.**

---

**APPELLANTS' OPENING BRIEF**

---

**FLORENCE MAYNE,**  
*Attorney for Appellants.*

**855 Dexter Horton Building,  
Seattle 4, Washington.**

**FILED**

**DEC 1 1945**



IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

EUGENE E. RITCH and A. W. HALL, *Appellants,*  
vs.

PUGET SOUND BRIDGE & DREDGING CO., INC., a corporation; JOHN R. RUMSEY, a sole trader doing business as Rumsey & Co., together doing business as Rumsey Puget Sound, a copartnership, *Appellees.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

---

APPELLANTS' OPENING BRIEF

---

FLORENCE MAYNE,  
*Attorney for Appellants.*

855 Dexter Horton Building,  
Seattle 4, Washington.



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**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

EUGENE E. RITCH and A. W. HALL,  
*Appellants,*

vs.

PUGET SOUND BRIDGE & DREDGING CO.,  
INC., a corporation; JOHN A. RUMSEY,  
a sole trader doing business as Rumsey  
& Co., together doing business as Rum-  
sey Puget Sound, a copartnership,  
*Appellees.*

No. 11150

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

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**APPELLANTS' OPENING BRIEF**

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**JURISDICTION**

Neither the jurisdiction of the District Court to try this action nor of the Circuit Court of Appeals, Ninth Circuit, to entertain this appeal is in dispute.

Complying with Rule 20, Section 2 (b), however, appellants make the following statement regarding the jurisdiction:

(1) Appellants rely upon the United States Statute to be found in United States Code Annotated, Title



28, Section 41 and Supplement (Judicial Code, section 24, amended), which confers upon the district courts original jurisdiction in controversies arising under the Constitution or laws of the United States and involving more than \$3,000.00, and also original jurisdiction in all suits and proceedings arising under any law regulating interstate commerce (Subsections 1 and 8).

Appellant's action involves not only interpretation of a Federal law and more than \$3,000.00, but it is brought under the Fair Labor Standards Act, U. S. C. A. Title 29, sections 201-218 inclusive, passed by the Congress of the United States in 1938, which is a law regulating commerce between the states. The basic questions of law and fact in the trial court, as well as upon appeal, are whether or not the claimants represented by the appellants were engaged in commerce or in the production of goods for commerce within the meaning of the words as used in that Act.

Actions under the Fair Labor Standards Act are governed by Section 216 (b) of the above code and title, which provides:

"Any employer who violates the provisions of section 6 or section 7 (206 or 207 U.S.C.A.) of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of



himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

(2) The validity of the Fair Labor Standards Act is not involved.

(3) To show the jurisdictional facts relied upon we must necessarily refer to the whole complaint (Record pages 1-22)\* because of the number of causes of action, with repetition of the jurisdictional facts, each claimant's duties, which he contends bring him within the scope of the Fair Labor Standards Act, being set out in a different cause of action.

The first cause of action (R. 2-4) is typical of all of the causes of action, alleging in paragraph I the identity of the defendants (appellees), location of the work at the Puget Sound Navy Yard, Bremerton, Washington, and the contract with the United States Navy Department; in paragraph II the duties of the particular claimant; in paragraph III the Fair Labor Standards Act; and in paragraph IV, the ultimate fact pleaded in each cause of action that by reason of his duties the claimant was engaged in interstate commerce or in the production of goods for commerce

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\*Hereafter, for the sake of brevity, we shall refer to the Record with the letter "R" only, followed by the page number or numbers.

between the states or from the State of Washington to places outside thereof under the terms and definitions of the act, and that the employer violated the provisions thereof with reference to his rate of pay for over-time work.

Each cause of action was assigned to the two plaintiffs. The assignments were introduced in evidence at the trial and are admitted in the Agreed Statement of Facts (R. 49).

This appeal was taken and perfected within the time limited by law and appellants now invoke the jurisdiction of this court to hear and determine it.

### STATEMENT OF THE CASE

The Agreed Statement of Facts on Appeal (R. 47-52) is probably as concise an abstract of the case as may be made, and Appellants' Statement of Points on Appeal (R. 45-47) presents the points involved as succinctly as possible, but it may be helpful to the Court to refer in this brief to the most salient facts and contentions.

#### I.

Appellees were contractors engaged in new, additional and repair construction work for the United States Navy Department at the Puget Sound Navy Yard in Bremerton, Washington, under Navy Fixed-Fee Cost-Plus Contract No. NOY4446 (R. 47), through which contract the United States Government is affected with a sufficient interest in the outcome of the case to defend the suit by means of the services of the United States District Attorney.

Appellants were white-collar workers on this

\$6,000,000 project. Four per cent of the construction materials used were shipped into the State of Washington (R. 49). A. W. Hall, Ralph O. Lund, Paul Mehner, Glenn E. Tyler and A. W. Torn were draftsmen, engaged in designing and laying out the various parts of the construction work. John W. Jameson, Henry I. Mayer and Wm. J. Sheffield were timekeepers, engaged in keeping the time of all who worked upon the project.

Although all the laborers and foremen on this huge piece of construction were paid at the rate of time and one-half for their overtime in excess of forty hours weekly, the few white-collar workers were paid at the rate of time and one-tenth. The Statement of Facts (R. 50) sets forth the undisputed amounts of overtime pay, exclusive of liquidated damages, costs and attorney's fees, due these claimants if they should be held to have been engaged in interstate commerce or in the production of goods for commerce, and, in the case of A. W. Hall only, not exempt from the terms of the Act.

The principal contention of these claimants as a group is that all of them were engaged in interstate commerce because they were employed, together with all the other workers on the project, in adding to and improving the existing facilities of a great instrumentality of commerce, the Puget Sound Navy Yard, situated in the navigable waters of Puget Sound, to whose piers the markets of the world send their cargoes of materials for the use of the United States Navy and from which the newly built and repaired ships of the United States Navy, both war-



ships and supply ships, set out for every foreign and domestic port.

### **Question No. 1**

The first question, therefore, is: Did the construction under this contract constitute such improvement to an already existing instrumentality of commerce that all the persons employed thereon, regardless of the nature of their duties, were engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

### **II.**

A secondary part of this contention is that the workers upon this construction project, improving, as it did, the facilities of the Navy for the production of ships and marine equipment, were engaged in tasks necessary to the production of goods for commerce.

### **Question No. 2**

The second question, therefore, is: Granted that the primary purpose of the United States building and repair yard is to build and repair warships, is not the function of supply and shipment of marine materials and ships to various ports important enough so that persons engaged in improving the supply and shipment facilities are employed in work necessary or helpful to the production of goods for commerce, i.e., ships and marine equipment?

### **III.**

The third contention is a narrower one: That these claimants, by nature of their individual duties, were engaged in interstate commerce. Four per cent of

the materials used in the construction work were ordered and received from outside the State of Washington. That amounted to \$240,000, certainly not an unsubstantial amount. The draftsmen estimated the amounts of materials to be ordered and submitted their estimates to the purchasing agent of the respondent company, who placed the orders. On receipt, the draftsmen checked the supplies as to quality and inspected the record as to such materials, also doing inspection and field engineering work during the installation of the materials, with some supervision over the installation (R. 51). They also designed and did the lay-out work on all the construction, including the piers and the railroad system which was an integral part of the new Pier No. 3.

The timekeepers kept the time of the draftsmen and all others on the project, including the workmen and foremen, all of whom were continuously working with and upon the four percent of out-of-state materials.

### **Question No. 3**

Were these claimants, by the nature of their individual duties, as outlined above, engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

### **IV.**

The fourth contention relates to only two of the timekeepers, William J. Sheffield and Henry I. Mayer, who worked upon the swing shift, and actually, as a part of their regular duties, received, checked in, receipted for and oversaw the unloading of all materials, both intra-state and interstate, that



arrived on the project during their hours of work (R. 50). They had no record of the amount of such shipments, and the employer introduced none although conceding their duties in this regard. The two men testified that they handled a considerable number of such interstate shipments.

#### Question No. 4

The question is, of course, whether such activities placed these two men in interstate commerce even if none of the other claimants was so engaged.

#### V.

In a separate category is the case of A. W. Hall, whom the appellees claimed to be exempt from the Act as a bona fide executive, administrative or professional worker. We bring this up as our fifth question, although according to the decisions the burden of proof regarding exemptions is upon the person asserting them.

A. W. Hall was employed from January 12, 1941, to April 8, 1941, simply as a draftsman. It is not claimed that he was exempt during this period. Thereafter, until May, 1942, he was given the title of "head draftsman" and his duties, according to the evidence of the appellees, were approximately 50% supervisory over the other draftsmen and 50% manual designing and drafting of the same nature as the duties of those whom he supervised. There is no evidence as to whom he assisted, or that he was a graduate or professional engineer, or that he had the right to hire and fire personnel, or any administrative or professional capacities other than supervision of

the other draftsmen. All the draftsmen worked under the supervision of the Superintendent and the Resident Engineer (R. 51).

### Question No. 5

The question is whether or not during the second period of his work, from April 8, 1941, to May 1, 1942, A. W. Hall came under the exemptions of the Act because he was a bona fide executive, administrative or professional worker.

### SPECIFICATIONS OF ERROR

For the sake of brevity we hope we may be permitted to list together as one error the entry of each of the Findings of Fact of the Trial Court, since they are exactly the same as to all eight causes of action:

**SPECIFICATION OF ERROR NO. 1:** The Trial Court erred in entering Findings of Fact Nos. I to VIII inclusive, to the effect that the several claimants were not engaged in interstate commerce (R. 32-33).

**SPECIFICATION OF ERROR NO. 2:** The Trial Court erred in entering the Conclusion of Law based upon such findings (R. 34).

**SPECIFICATION OF ERROR NO. 3:** The Trial Court erred in dismissing appellants' action as to each and all of the separate claimants represented by appellants here (R. 38-39).

Broadly speaking, these assignments constitute but one general error: The error of interpreting too narrowly the phrase "engaged in commerce or in the production of goods for commerce" as used in the

Fair Labor Standards Act, and in holding "that the dock and dock structures which were being built by these plaintiffs as employees of the defendants were not instrumentalities of commerce \* \* \* " (Court's Decision, R. 41).

Since all assignments of error are essentially one, we find it impossible to segregate our argument as to the entry of the findings, conclusions and judgment, and must discuss all together, bearing in mind that the error of the Honorable Trial Court relied upon by the appellants on appeal was his application of the law to the facts, which were never seriously in dispute, as pointed out in our Statement of Points on Appeal (R. 46).

### **ARGUMENT**

The questions involved have already been summarized in our Statement of the Case (*supra*, pages 4-9). We shall, therefore, address our argument to them seriatim.

#### **I. Were the Extensions and Improvements Built at the Puget Sound Navy Yard Such Construction Upon An Already Existing Instrumentality of Commerce That All the Claimants Were Engaged In Interstate Commerce?**

##### **The Statute**

The Fair Labor Standards Act of 1938, U.S.C.A. Title 29, Section 207, p. 485, provides:

"Sec. 207. Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his em-

employees who is engaged in commerce or in the production of goods for commerce

“(1) (Inapplicable).

“(2) ”

“(3) For a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

Section 203, p. 447, provides:

“Commerce means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.”

The Trial Court was of the opinion that the United States Navy was not engaged in commerce, and in the ordinary commercial sense and understanding of the term, that may be true, but no one can gainsay that the United States Navy is engaged in *transportation* on an extensive scale, between the different states and foreign countries and that its Navy Yards furnish the facilities by which it operates such transportation.

Goods moving interstate for the convenience of the United States Government are not exempted from the Act. *Clyde v. Broderick* (C.C.A. 10, July 26, 1944) 144 F.(2d) 348. *Simkins v. Elmhurst Contracting Co.*, 46 N.Y.S.(2d) 26.

The Fair Labor Standards Act applies to transportation by the Government itself in its sovereign



capacity. *Timberlake v. Day & Zimmerman* (D. C. Iowa) 49 F. Supp. 28.

The evidence in this case was to the effect (R. 48) that vast transportation facilities, in addition to the actual salt water piers, were being provided for by the work of these claimants, among others; that these consisted of a whole railroad system which was tied in with the general Navy Yard railroad system and connected with the commercial car landing of the City of Bremerton. Tracks were completed on the pier while the job was in progress, having been designed and laid out by the draftsmen who are claimants here, and ordinary railroad cars of common carriers were used on the tracks to unload materials, four per cent of which, it must be remembered, were ordered and received from outside the State of Washington.

### **The "Instrumentality of Commerce" Cases**

Not many cases have been decided upon the "instrumentality of commerce" theory, as it happens that by far the largest number of cases come up under the "production of goods for commerce" phrase rather than the "engaged in commerce" phrase. This is natural, no doubt, in a manufacturing nation. It may be remarked here, in passing, that the courts have been inclined to give the broadest possible interpretation to the "goods for commerce" phase of the act, while tending to scrutinize more closely the contention that the claimant was "engaged in commerce," this no doubt because of the exemption of the employees of common carriers engaged in the



actual work of transportation (Sections 213a-4, a-9 & 213b).

Out of the number of cases construing the phrase, "engaged in commerce," the number, then, concerned with instrumentalities of commerce has been small. Nor are there many cases dealing with construction work. However, in those that do exist distinctions have been made between (1) original construction as opposed to repairs or extension and (2) ordinary buildings or structures as against those which are instrumentalities of commerce.

Two cases involving instrumentalities of commerce as such have come before the United States Supreme Court.

*Overstreet v. North Shore Corporation*, 63 S. Ct. 494, 318 U.S. 125, holds that a drawbridge over a navigable waterway, and the toll road of which it is a part, connecting with an interstate highway, are instrumentalities of commerce, and persons engaged in operating the bridge, repairing the bridge and road and selling and collecting toll tickets are engaged in interstate commerce because they are so closely related to the interstate passage of persons and goods that they must be within the contemplation of the Act. The defendant in this case argued that he was not engaged in commerce himself but only in providing facilities for others who were so engaged, but the Court said these objections were not well taken.

For authority on which to decide this case, the High Court went back to the Employers' Liability cases and declared an analogy, referring to the case

of *Pedersen v. Delaware, Lackawanna & Western Railroad Company*, 33 S. Ct. 648, 229 U.S. 146, in which an employee carrying a sack of bolts on his way to a bridge he was helping to repair, was killed by an intra-state carrier on another bridge. He was held to be engaged in interstate commerce because he was keeping an instrumentality of commerce in repair and was killed in the course of his employment.

*Pedersen v. J. F. Fitzgerald*, 63 S. Ct. 558, 318 U.S. 740, 742, went a step farther than the *Overstreet* case in holding (without opinion) that persons building *new* abutments on railroad bridges, even though not necessary nor used in any way during the course of the work being performed, the running of trains being entirely independent thereof, were engaged in commerce. On the authority of the *Overstreet* case, *supra*, the Supreme Court reversed the New York Court of Appeals, who had been of the opinion that such construction was not covered by the Act, 43 N.E.(2d) 83.

*Slover v. Wathen* (C.C.A. 4, 1944) 140 F.(2d) 258.

The employer leased a pier, repaired barges tied to it. The employee was a night watchman. The Court said: "The barges operated by Wathen moved in interstate commerce and they therefore were instrumentalities of interstate commerce." The employee was held to be in interstate commerce.

*Walling v. New Orleans Private Patrol Service* (D.C. La.) 57 F. Supp. 143, held that watchmen and guards employed by private patrol services guarding essential instrumentalities of interstate commerce

such as wharves, ships and other facilities of steamship companies, were engaged in interstate commerce.

*Walling v. Patton-Tulley Transportation Co.* C.C.A. 6, Apr. 8, 1943) 134 F.(2d) 945. The plaintiffs were employees working on dike and revetment construction in the Missouri and Mississippi Rivers under contracts of their employer with the United States. It was held that an employee is engaged in interstate commerce if he is working upon an instrumentality of interstate commerce. The objection was made that this was the construction of a facility not yet employed in interstate commerce, but the court said:

"The short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory, and so the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce does not apply."

With equal force we may argue that Puget Sound has been a highway of interstate commerce for a long, long time and the Puget Sound Navy Yard has been situated upon that highway for a great many years, and these Navy Yard improvements, even the new installations, touch upon and are a part of that highway of commerce and facilitate the movement of the Navy's ships and barges, as well as the barges of railway cars which came to rest there and discharged their cargoes even during the construction period (R. 48).



The trial court, however, rejected this theory, on the authority of the case from the Southern District of New York, then newly decided, entitled *Joseph A. Brue, et al. v. J. Rich Steers, Inc., et al.*, now reported in 60 F. Supp. at page 668.

That case proceeded upon the narrowest possible view of the situation. The plaintiff was an inspector of concrete work on a Navy dry dock. The court decided the case on the basis of previous decisions regarding original construction of *ordinary buildings*, and rejected the "instrumentality of commerce" theory together with the case of *Walling v. Patton Tulley, supra*, but the peculiar part of this decision is that it lays stress upon the *Interpretative Bulletin* No. 5, issued by the Wage and Hour Division of the United States Department of Labor, and states that great weight should be given to administrative interpretations, quoting approvingly Section 12 of the *Bulletin* which states that "employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines," while completely ignoring Section 13 of the same *Bulletin* which follows immediately thereafter and reads:

"Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act \* \* \* "

In *Bulletin* G-162 of the Wage and Hour Division,

entitled, "Applicability of the Fair Labor Standards Act to Employees of Building and Construction Contractors," the Administrator, in paragraph II, states:

"The Division does not take a definite position concerning the status under the Act of employees engaged in the original construction of essential instrumentalities of interstate commerce."

In other words, the Administrator has expressed no opinion on this question. He goes further, in this *Bulletin* G-162, *paragraph IV*, however, to define "essential instrumentalities of commerce" as follows:

"Railroad tracks, equipment and facilities; highways; city streets over which interstate commerce regularly travels; rivers, streams, harbors and other waterways used more or less regularly in the interstate transportation of goods; bridges over which interstate commerce more or less regularly travels; pipe lines used for the interstate transportation of liquids and gas; dams, the effects of which is to enhance and improve navigable waters as instrumentalities of commerce; wharves and docks which directly facilitate the movement of goods in interstate commerce; telephone and transmission lines; telephone exchanges; telephone buildings and post offices. This list is not intended to be exhaustive \* \* \*"

The appellants on this point are contending for a broad interpretation of the Act, one which will carry out the beneficent purposes of the Congress in promoting better labor conditions, shorter hours, a spreading of the work and uniform methods of computing overtime pay, this uniformity being very important in preventing labor unrest and dissatisfac-



tion between different groups working for the same employer. One need look no farther than the instant case for an example of the unfairness of different wage scales, where, on a \$6,000,000 project conducted on the generous scale well known to cost-plus contracts, some few workers, not exceeding fifteen or sixteen persons, were singled out for economy measures totaling approximately \$5,000 in savings. It is as if someone wished to be able to point to some isolated spot where economy had reigned. That it is our own Government, which passed the Fair Labor Standards Act and has been rigid in its standards of compliance for private employers, who should have instituted and who now defends this discriminatory policy on a contract where *it* is obligated to make the payment, seems inconsistent and highly ironical.

A broad interpretation of the Act, by which these claimants may be held covered because they were engaged upon an instrumentality of commerce, would cure this anomalous situation. No appellate court, so far as we have been able to find, has yet passed upon this exact question, so this Honorable Court is free to take the broad view if it is so inclined.

There are many cases giving a liberal interpretation to the Fair Labor Standards Act. See:

*Walling v. Jacksonville Paper Co.*, 63 S. Ct., 332, 317 U.S. 564, 87 L. ed. 460, in which the Supreme Court laid down the principle that "It is clear that the purpose of the Act was to extend Federal control

in this field throughout the farthest reaches of the channels of interstate commerce.”

*Pickett v. Union Terminal Co.* and  
*Williams v. Jacksonville Terminal Co.*, 62  
 S. Ct. 659, 315 U.S. 386;

*Walling v. Mutual Wholesale Food & Supply Co.* (C.C.A. 8, Minn. 1944) 141 F.  
 (2d) 331;

*Fleming v. American Stores Co.* (D.C. Pa.  
 1941) 42 F. Supp. 511.

The application of the fair statements contained in those and other cases to the claims involved here, in a practical and common-sense way, is all that is necessary, and the case seems to be of first impression in an appellate court.

## II. Were the Appellants Engaged In the Production of Goods for Commerce, *i. e.*, Ships and Marine Equipment?

### The Statute

Further referring to the text of the Fair Labor Standards Act, U.S.C.A., Title 29, Section 203(i) provides:

“‘Goods’ means goods (*including ships and marine equipment*), wares, products, commodities, merchandise, or articles or *subjects of commerce* of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.”  
 (Italics ours)

while Section 203(j) provides:

“‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked

on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof, in any State.*" (Italics ours)

Taking these two sub-sections together we may see how really broad is the meaning of "the production of goods for commerce," as the term is used in the Act, and the courts have not been slow to extend the meaning to the farthest reaches of production.

We have found no cases in point on the facts here, but one of the broadest interpretations of this clause is to be found in the Supreme Court case of *Armour & Co. v. Wantock*, 65 S. Ct. 165 (Adv. Sheets), in which it was held that a private fire fighting force at a soap company in Chicago which produced goods for commerce, men who had nothing to do with producing goods for commerce and were not night watchmen, were necessary to the production of goods for commerce and covered by the Act.

It is under such a broad interpretation that night watchmen and maintenance men, both as employees of producing plants and employees of landlords whose *tenants* produce goods for commerce, have been held necessary to the production of goods for commerce.

*Fleming v. Atlantic Co.* (D.C. Ga.) 40 F. Supp. 654, holds clerical help, maintenance and repair men so covered.

*Walling v. American Stores Co.* (C.C.A. 3, 1943) 133 F.(2d) 840, applies the principle to maintenance

men, janitors and warehousemen, receiving clerks, office employees and shipping clerks.

*Fleming v. Kirschbaum Co.* (C.C.A. 3, 1941) 124 F.(2d) 567, applies this section to all building maintenance employees, elevator operators and firemen, where a number of the employer's tenants manufactured goods shipped in interstate commerce.

*Allen v. Moe* (D.C. Ida. 1941) 39 F. Supp. 5, held that a plaintiff employed by contractor who cut logs and delivered them afloat to match company to be processed into match blocks and matches to be sold in interstate commerce was engaged in the production of goods for commerce.

*Divine v. Levy* (D.C. La. 1941) 39 F. Supp. 44, applied the Act to common laborer employed in the erection of drilling rigs for a small oil producer although most of the oil was sold within the state, saying that the laborer took the first step in the interstate movement of the oil.

See also:

*Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278. Maintenance and service employees of building covered.

*Hart v. Gregory* (N. Car. 1940) 10 S.E.(2d) 644. Night watchman who pumped water into boilers of lumber mill is engaged in an occupation necessary to production.

*Fleming v. Pearson Hardwood Flooring Co.* (D.C. Tenn. 1941) 39 F. Supp. 300. Another night watchman held covered.

*Murray v. Noblesville Milling Co.* (D.C. Ind. 1942)



42 F. Supp. 808, covers wheat storage elevator employees where milling as well as storage was carried on and the product was shipped in commerce.

The cited cases demonstrate the lengths to which the courts have gone in holding employees necessary to the production of goods for commerce.

It is our contention that the claimants here were engaged in an initial process which made possible the production of ships and marine equipment, and that these were subjects of commerce, and also instrumentalities of commerce.

### **III. Were the Claimants, By the Nature of Their Individual Duties, Engaged in Interstate Commerce Because of Their Connection With the Interstate Movement of Materials?**

(1) The Draftsmen. Were these employees, because they estimated the amounts of materials to be ordered by the purchasing agent and checked the incoming materials for quality and quantity, so closely related to the movement of interstate shipments that they were "in commerce?"

(2) The Timekeepers. One of the timekeepers, John W. Jameson, had no direct connection with the interstate movement of materials (R. 50-51). He merely kept the time of others who did have such contact, and unless he may be held to have been covered on one of the broader grounds already urged, it is doubtful whether his cause of action is a good one. The Court could, however, in taking the larger view, also decide that one who keeps the time of other persons concerned with the ordering, receipt, record



keeping, unloading and otherwise handling of interstate shipments is likewise engaged in commerce.

The other two timekeepers will be discussed separately under the next heading, because their connection with commerce was more direct.

The Trial Court in his Decision states that "it is clear that these plaintiffs did nothing that had any casual connection with, or in any way affected, or related to, the movement in commerce of these materials" (R. 41). It appears that he must have overlooked the testimony (R. 51) that it was the draftsmen who estimated the amounts of supplies to be ordered and submitted their estimates to the purchasing agent, who placed the order. After the supplies arrived they checked for quality and inspected the record as to such materials. Presumably if the quality had not been up to standard or if the materials were unsuitable, they would have been sent back, again entering the channels of commerce.

The most important of the draftsmen's duties, apart from their technical work in design and layout, was their part in the ordering of materials. How would the purchasing agent have had any idea what to order if the draftsmen had not first made the lists to conform to their plans? This one step alone, it seems to us, is sufficient to place the draftsmen in interstate commerce as to the four per cent of materials that were ordered from outside the state.

See *Walling v. Jacksonville Paper Co.*, 63 S. Ct. 332, 317 U.S. 564.

The question then arises as to whether or not four

per cent is a substantial portion of materials and of the employees' time.

This Court has passed upon the question of substantiality in the case of *Southern California Freight Lines v. McKeown*, in cause No. 10,873 on April 21, 1945, 148 F.(2d) 890. In that case it was stipulated that 7% of the employee's time had been concerned with interstate commerce. It was contended that this was not substantial. This Court said:

"It is apparent that if there had been a cut of 7% in the employee's pay check it would not be regarded as unsubstantial or *de minimis* by any laborer or his union. Nor would a reduction of his 8-hour day of 7%, that is, to 7 hours and 27 minutes, be regarded as unsubstantial. No leader of a labor union nor its members would regard such a reduction of the labor day an unsubstantial gain. \* \* \* However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act. (Wagner Act or Fair Labor Standards Act.)

"In this connection we have said in *National Labor Relations Board v. Cowell Portland Cement Co.*, 108 F.(2d) 198, 201,

" 'The quantity of cement shipped out of state is not *de minimis* merely because it is but a small percentage of respondent's total sales \* \* \* .'

"We agree with the opinion of the Tenth Circuit in *New Mexico Public Service v. Engel*, 145 F.(2d) 636, that an employee occupied in interstate commerce in an enterprise but four per cent of which is interstate, and, as here, continuously engaged therein, is substantially en-

gaged in commerce within the meaning of the Act. \* \* \*

The cited case, *New Mexico Public Service Co. v. Engel*, 145 F.(2d) 636, holds that an engineer engaged in the manufacture and distribution of electricity, none of which was transmitted across state lines, but approximately four per cent of which was sold to customers engaged in both intra and interstate commerce was "engaged in commerce" within the Fair Labor Standards Act, because so closely related to interstate commerce and because cessation would interfere with the free movement of commerce; that Congress intended to extend Federal control in this field throughout the farthest reaches of the channels of commerce and the courts should be guided by practical considerations.

We believe that the draftsmen in the instant case were indispensable to the procurement of the goods that moved in interstate commerce and on that ground alone should be entitled to recover.

#### **IV. Were the Two Timekeepers Who Actually Received Interstate Shipments In More Favorable Positions Than the Other Claimants?**

The Statement of Facts (R. 50) shows that Henry I. Mayer and William J. Sheffield worked on the swing shift, and, because there was no material clerk on that shift during a part of that time, checked in, receipted for and oversaw the unloading of intra-state and interstate shipments that arrived on the job during their hours of work. No evidence was introduced as to the amounts of such shipments, the claimants testifying that they handled a considerable num-



ber of them. They also, of course, had the usual duties of timekeepers on the job.

*Walling v. Jacksonville Paper Co.*, 63 S. Ct. 332, 317 U.S. 564, affirmed the holding of the Circuit Court that employees who are engaged in the procurement or receipt of goods from other states are engaged in commerce if so engaged a substantial part of the time. The case also holds that goods delivered to a customer in the same state as the merchant but ordered especially from outside the state for him are in interstate commerce whether they come direct to the customer or stop in transit at the warehouse. This case from the Supreme Court would seem to be determinative of these questions, but there are many others. See:

*Walling v. Sanders* (D.C. Tenn. 1942) 48 F. Supp. 9;

*Walling v. Craig* (D.C. Minn. 1943) 53 F. Supp. 479;

*Eddings v. Southern Dairies* (D.C. S.C. 1942) 42 F. Supp. 664;

*Jewel Tea Co. v. Williams* (C.C.A. 10 1941) 118 F.(2d) 202.

It will be remembered that the Statement of Facts shows (R. 49) that most of the out-of-state materials came to Bremerton directly but some went first to the defendant's warehouse in Seattle and were transported to Bremerton as needed. The above cited cases discuss both points involved here.

On actual receipt of shipments, the following cases are enlightening:

*Walling v. Goldblatt Bros.* (C.C.A. 7, 1942) 126 F.(2d) 778, Certiorari denied 63 S. Ct. 528, 318 U.S. 757. The Circuit Court said:

"We conclude that those employees who order and procure, those who unload goods from without the state, at defendant's warehouse, those who check them before they are deposited on the unloading platform, those who manufacture goods at the warehouse, those engaged in maintaining, operating, caring for and servicing warehouses where production for commerce occurs, and those who pack and ship goods to Indiana from the warehouses are within the Act. Those employees, however, who are concerned solely with storage in the warehouses and in delivery of goods to the Illinois stores and those printing and preparing record books, memoranda and advertising copy are not subject to the Act."

*Walling v. Mutual Wholesale Food & Supply Co.*, 141 F.(2d) 331, also passed on this question along with many others. There were several defendant companies, none of them concerned in producing goods, so the concern of the court was wholly with the "engaged in commerce" provision, except as to possibly one defendant, the Merchandise Terminal Warehouse. As to another defendant, Lawrence, it was held:

"Such duties as have to do with unloading and checking incoming interstate shipments to Mutual and filling orders for checking and loading shipments for Thomas Stores for Mutual are within the Act. The employees of Lawrence who are engaged in any of the latter duties to a substantial extent for any week are for that period, within the Act."

*Fleming v. American Stores Co.* (D.C. Pa. 1941) 42 F. Supp. 511, and *Walling v. American Stores* (C.C.A. 3, 1943) 133 F.(2d) 840, held as follows:



The District Court held that the chain store's warehouse employees were covered except those engaged only in servicing retail stores, saying:

"All employees who rendered services in connection with incoming goods (whether in actual physical handling of the goods or in the compilation of records or other operations pertaining to incoming goods) are subject to the provisions of the Act."

The Circuit Court affirmed the holding except that it broadened the coverage to include *all* the warehouse employees because of the continuity of movement of goods from outside the state to final destination, i.e., the retail stores.

We think on the basis of an overwhelming amount of authority this Court must conclude that Mr. Sheffield and Mr. Mayer, who actually received and checked in interstate merchandise in considerable quantities, are entitled to recover. It is the employer's duty to keep time records (FLSA USCA Title 29, Sections 211 and 215(5)) and it has been held that where such a showing has been made by the employee, the burden is upon the employer to segregate the time, keep the records and prove that the employee was not engaged in commerce a substantial portion of his time; otherwise, the employer could always defeat the employee because the latter would never be able to prove his case. *Ling v. Currier Lumber Co.* (D.C. Mich. 1943) 50 F. Supp. 204.

#### **V. Was A. W. Hall Exempt As a Bona Fide Executive, Administrative or Professional Worker?**

Assuming that Mr. Hall, together with the other

*Montague 140 7(2) 500*

draftsmen, was engaged in interstate commerce or in the production of goods for commerce, did his coverage under the Act cease on April 8, 1941, when he was made head draftsman, spending approximately 50% of his time in designing and drafting and 50% in supervision of the other draftsmen. We think if we have shown the engagement in commerce, the burden is upon the appellees to prove the exemption, since the Fair Labor Standards Act is a remedial statute and exemptions and exceptions are to be strictly construed, with the burden upon the person asserting them. *Brown v. Minnigas Co.* (D.C. Minn. 1943) 51 F. Supp. 363, citing to support statement that exemptions are affirmative defenses the case of the Michigan Circuit Court in *Cooper v. Gas Corporation* (1941) 4 Wage & Hour Reporter 550.

The Fair Labor Standards Act is a remedial statute and must be liberally construed, exceptions and exemptions to be strictly construed. *Fleming v. American Stores Co.* (D.C. Pa. 1941) 42 F. Supp. 511; *Fleming v. Hawkeye Pearl Button Co.*, 113 F.(2d) 52.

In the state of the record, we can see nothing to exempt Mr. Hall in any of the three categories. The statute, U.S.C.A. Title 29, Sec. 213 (a) (1), is brief, but the regulations of the Administrator, U.S.C.A. Title 29, Chapter V, Code of Federal Regulations, Part 541, Sections 541.1, 541.2 and 541.3, pages 625-27, are too long to quote here verbatim, so we merely refer to them.

As to Section 541.1, relating to Executives, we submit that Mr. Hall, so far as the record shows, does not fit (A), (C), (E) or (F); that these qualifications,

or disqualifications, are in the conjunctive and that an employee must meet all of them to be exempted. *Fanelli v. U. S. Gypsum Co.* (C.C.A. N.Y. 1944) 141 F.(2d) 216; *Walling v. Yeakley* (C.C.A. Colo. 1944) 140 F.(2d) 548; *Walling v. Emery Wholesale Corporation* (D.C. Ga. 1943) 49 F. Supp. 192, aff. 138 F.(2d) 548.

As to Section 541.1, relating to Administrators, which is in the disjunctive as to the subsections of (B) but in the conjunctive as to (A) and (B), we submit that there is no showing as to Mr. Hall's salary (A), and no showing under (B) (1) that he was assistant to any executive or administrator; no showing under (B) (2) that his non-manual work (50%) was directly related to management policies or general business operations or that in his technical work he exercised discretion and independent judgment; no showing under (B) (3) that he performed special non-manual assignments and tasks related to management policies or general business operations; and nothing whatever to connect him up with (B) (4) relating to common carriers. There is, in fact, nothing in the record to suggest that Mr. Hall was any kind of administrator. He was in fact, a working foreman of the draftsmen.

*Sun Publishing Co. v. Walling* (C.C.A. 6, 1944) 140 F.(2d) 445, held that a working foreman of a composing room whose work was 80% the same as those supervised and 20% supervisory was not an administrative employee.

As to Section 541.3, relating to Professional employees, Mr. Hall fails to come within the exemp-



tions because here again the sub-sections are in the conjunctive and the employee must meet all of them to be excepted. Mr. Hall fails to meet any of the sub-sections, so far as the evidence shows, except possibly (A) (1) and (2), conceivably (3). On (A) (4) alone, by which he must not do work of the same nature as non-exempt employees more than 20% of his time, the disqualification fails. His was 50-50, by the appellees' own witness. There was no testimony that he was a graduate or professional engineer, or especially well qualified or given any considerable amount of authority. He was a supervising draftsman and no more during the second period of his employment, from April 8, 1941 to May 1, 1942.

### CONCLUSION

The Fair Labor Standards Act is accumulating about it a very large amount of interpretative case law, based not only upon the Act but upon the Administrator's regulations. Most of it, we are glad to say, from extensive perusal of the cases, is liberal in character, although there are certainly differences of opinion among the courts on many of the finer points. But we have every confidence in the liberal tradition of this Court in exercising every intendment in favor of the beneficiaries of a remedial act, intended to correct grave labor abuses, among which are discrimination among employees, lack of uniformity, favoritism. We believe that the Congress in passing and the President in signing the Act, intended its benefits to extend to that portion of labor known as the white-collar workers, provided only that they can show they were

engaged in commerce or in some capacity necessary to the production of goods for commerce. We believe that on any one of our theories of the case, the appellants here are entitled to judgment as claimed, and that no one of the claimants should fail.

Respectfully submitted,

FLORENCE MAYNE,

*Attorney for Appellants.*



United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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EUGENE E. RITCH and  
A. W. HALL,

*Appellants,*

vs.

PUGET SOUND BRIDGE & DREDGING  
CO., INC., a corporation;

JOHN R. RUMSEY, a sole trader doing  
business as Rumsey & Co., together doing  
business as RUMSEY PUGET SOUND,  
a copartnership,

*Appellees.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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HONORABLE JOHN C. BOWEN, *Judge*

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APPELLEES' ANSWERING BRIEF

---

J. CHARLES DENNIS

FRANK PELLEGRINI

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1017 UNITED STATES COURT HOUSE  
SEATTLE 4, WASHINGTON



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HONORABLE JOHN C. BOWEN, *Judge*

---

**APPELLEES' ANSWERING BRIEF**

---

**STATEMENT OF THE CASE**

This is an action under the Fair Labor Standards Act of 1938, as amended, (Sections 201 - 218, Title 29 U.S.C.), hereinafter referred to as the Act, by the appellants, as employees of the appellees and as assignees of other employees, to recover, on their own behalf and as assignees, overtime pay for hours worked in excess of 40 hours a week and an addi-

tional equal amount as liquidated damages and attorney's fees. The Complaint (R. 2-22) consists of thirteen causes of action. Judgment was entered on stipulation between the parties, granting the appellants a recovery on the First, Seventh, Eighth, Ninth and Tenth Causes of Action (R. 34-37). The case was tried by the Court without a jury as to Causes of Action Two, Three, Four, Five, Six, Eleven, Twelve and Thirteen, resulting in the entry by the Court of a separate judgment dismissing the said causes of action (R. 38-39). The appellants have appealed from the judgment dismissing the case as to said causes of action.

The appellees are contractors. They had a contract with the United States (Navy Department) to construct new and additional facilities at the Puget Sound Navy Yard, Bremerton, Washington, consisting of a new reenforced concrete pier, known as Pier 3, a new pump well for a drydock, ship ways for building steel ships and barges, bomb shelters, a five-acre fill and revetment reclaiming tidelands with quay wall, a tool shop, toilet facilities, and an extension to an existing building and to an existing quay wall. The contract also provided for minor repairs to be made to a pier of the Naval Torpedo Station at Keyport, Washington, a few miles away from the

Navy Yard. Pier 3 when completed was to be for the exclusive use of the United States Navy in the repair of naval combat vessels and not for commercial purposes.

The Complaint (R. 2-22) alleges, and the Answer (R. 23-24) admits that the appellant, A. W. Hall, Second Cause of Action (R. 4-5), was employed as an office draftsman and engineer, designing and detailing railroad system, ship ways and pipe systems for Pier 3 and supervised other office draftsmen in similar work; that John W. Jameson, Third Cause of Action (R. 6), was employed as head timekeeper, checking time and figuring weekly pay for employees engaged in the construction work upon said Pier 3; that Ralph O. Lund, Fourth Cause of Action (R. 7), was employed as an office draftsman, designing and detailing facilities for two buildings and personnel shelters in the regular course of the construction work upon said Pier 3; that Henry I. Mayer, Fifth Cause of Action (R. 8-9), was employed as a timekeeper in checking time and payrolls of employees engaged in the construction work on the said Pier 3; that Paul Mehner, Sixth Cause of Action (R. 10), was employed as an office draftsman, detailing plans for the construction work on said Pier 3; that William J. Sheffield, Eleventh Cause of Action (R. 17), was em-



ployed as an assistant timekeeper in the regular course of the construction work on the said Pier 3; that Glenn E. Tyler, Twelfth Cause of Action (R. 18), was employed as a field engineer and draftsman in connection with the regular construction work on said Pier 3; that A. W. Torn, Thirteenth Cause of Action (R. 19-20), was employed as an office draftsman, designing and detailing facilities for Pier 3 and the ship ways, all in the course of the construction of said pier.

Ninety-six percent (96%) of the materials used in the construction work were obtained locally within the State of Washington. Four percent (4%) of the materials were obtained from outside the State of Washington. None of the claimants had any direct connection with the receipt of materials delivered to the job site with the possible exception of Henry I. Meyer and William J. Sheffield who worked on the swing shift as timekeepers and as part of their work checked in, receipted for and oversaw the unloading of materials arriving at the job site during their hours of work (R. 50). The claimant, John W. Jameson, as timekeeper had no direct contact with shipments of materials, his only duties were to keep the time of other employees (R. 50-51). The other claimants, as draftsmen and office engineers, estimated the ma-



terials required on the job, submitted their estimates to the appellees' purchasing agent and after materials were received and in the warehouse, inspected the said materials and performed other duties in connection with field engineering work (R. 51). The appellant, A. W. Hall, for a part of his employment was a draftsman, so employed from January 12, 1941, to April 8, 1941; on May 1, 1942, he was promoted to head draftsman, and thereafter his duties consisted of approximately fifty percent (50%) supervising and fifty percent (50%) designing and drafting (R. 51).

## ARGUMENT

*Introductory Statement:* The District Court rendered its decision on two theories (1) that the dock in question is not an instrumentality of commerce, and (2) that the employees involved in this action were not engaged in commerce or in the production of goods for commerce. The question of whether or not the dock was an instrumentality of commerce we consider to be immaterial in presenting this appeal. We rely on the second of the trial Court's theories, namely, that the employment activities of the claimants related solely to new construction and they were not engaged in commerce or in the production of goods

for commerce. It is noted in this connection that the trial judge expressly approved as applicable to this case the reasoning and decision in *Brue v. J. Rich Steers, Inc.*, 60 F. Supp. 668 (S.D. N.Y.) which was bottomed on exactly that ground. See also *Nieves et al vs. Standard Dredging Corporation* (C.C.A. 1)-9 ~~Wage and Hour Reporter 29.~~ (Federal Reporter Citation not available).

*Burden of Proof.* The burden is on the appellants to prove that in the course of performing services for the appellees the claimant employees (a) engaged in the production of goods for commerce, or (b) engaged in commerce. *Warren-Bradshaw Co. v. Hall*, 317 U.S. 88.

## CLAIMANTS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE

In support of their argument that the claimant employees were engaged in the production of goods for commerce, the appellants contended that the construction of Pier 3 was the initial process in the "production of ships and marine equipment, and that these were subjects of commerce, and also instrumentalities of commerce." (Page 22, Appellants' Brief). They admit there are no cases in point in support of their conclusions.

It is now well settled that while the employee need not participate physically in the productive process, the activity in which he is engaged must have such a close and immediate tie with the process of production of goods for commerce as to be an essential part of it. *Kirschbaum v. Walling*, 316 U.S. 517; *Warren-Bradshaw Co. v. Hall*, *supra*; further that remoteness of a particular occupation from the physical process of production is a relevant factor in drawing the line. *10 East Fortieth Street Building v. Callus*, 325 U.S. 578. The Courts applying the foregoing rules to cases involving the construction of plants, drydocks and other structures, which when completed were to be used in the production of goods for commerce, have consistently held that the contractors' employees were not engaged in an occupation necessary to the production of goods for commerce. *Noonan v. Fruco Construction Co.*, (C.C.A. 8) 140 F. (2d) 633; *Scott v. Ford, Bacon & Davis*, D.C. 55 F. Supp. 982; *Wells et al v. Ford, Bacon & Davis*, 7 Labor Cases, Par. 61, 929, affirmed without opinion, 6th Cir., 145 F. (2d) 240; *Brue v. J. Rich Steers*, *supra*; *Damon v. Ford, Bacon & Davis*, 62 F. Supp. 446; see also: *Dollar v. Caddo River Lumber Company*, D.C., 43 F. Supp. 822; *Ballard v. Consolidated Steel Corporation*, 61 F. Supp. 996; *Barbe v. Cummins Construction Co.*, D.C., 49 F. Supp. 168; (C.C.A.

4) 138 F. (2d) 667. The record in this case conclusively establishes that the appellees are contractors and as such were engaged in a purely local activity, that is, the construction of a pier, which when completed was not to be used for commercial purposes but for war purposes. There is no evidence the appellees or the claimants were ever engaged in producing any ships or parts for ship repairs. The only services performed by the claimants were in prosecution of the construction work. The Administrator of the Wage and Hour Division, Department of Labor, has held that the provisions of the act are not applicable to employees of builders and contractors. In Bulletin 5, Paragraph 12, the Administrator places the following interpretation on the applicability of the Act:

“The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate



commerce and are for that reason entitled to the benefits of the Act."

This administrative interpretation is entitled to weight. *United States et al v. American Trucking Associations*, 310 U.S. 534.

To sustain their contention the claimants were engaged in the production of goods for commerce, the appellants cite a number of cases. An examination of the cited cases will disclose that in each instance the employer was directly involved in the production of goods for commerce or that the employee furnished services directly contributing to, and necessary for the production of goods for commerce. In this case the evidence conclusively shows that the appellees were at no time engaged in the production of goods for commerce. The only services performed by the claimants were in connection with the original construction of fixed facilities.

### CLAIMANTS WERE NOT ENGAGED IN COMMERCE

It is urged by the appellants that the Puget Sound Navy Yard is an instrumentality of commerce and since the construction work constituted an improvement to an already existing instrumentality of commerce this court must hold that the appellees'



employees, performing services in the construction work, are engaged in commerce within the meaning of the Act.

Having assumed that the Navy Yard is an instrumentality of commerce, appellants contend that Pier 3, being an improvement or extension of the facilities, all persons engaged in the construction work were engaged in interstate commerce on the theory that they rendered services essential in the maintenance and repair of the facilities. Cited in support of this contention are the following cases: *Overstreet et al v. North Shore Corp.*, 318 U.S. 125; *Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U.S. 740; *Pedersen v. Delaware, Lackawanna & Western Railroad*, 229 U.S. 146. In these cases the Supreme Court held that employees engaged in maintenance and repair work of an instrumentality used in interstate commerce were themselves engaged in interstate commerce. The undisputed facts in this case show that Pier 3 was a "new, permanent and reenforced-concrete repair pier for naval vessels", which when completed would become a part of the Navy Yard, a major building and repair yard of the United States Navy (R. 48-49). There is no evidence that the work on Pier 3 was in the nature of maintenance or repair work. In view of this record, it is apparent that the

Supreme Court decisions in the foregoing cases cannot be applied to the facts in this case.

In reaching its decision in *Overstreet et al v. North Shore Corp. supra.*, the Supreme Court at Page 128 states:

“A practical test of what ‘engaged in interstate commerce’ means has been evolved in cases arising under the Federal Employers’ Liability Act (45 U.S.C. Sec. 51 et seq.) which, before the 1939 amendment (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier ‘in such commerce’ 35 Stat. 65.”

In construing the Federal Employers’ Liability Act the Supreme Court and this Court have consistently held that employers and employees engaged in *new* construction work are not engaged in interstate commerce within the meaning of the Federal Employers’ Liability Act, although the new construction was designed for use and when finished would be used in interstate commerce. One of the foremost cases applying this doctrine is a case decided by this Court under the Federal Employers’ Liability Act. In *Raymond v. Chicago, M. & St. P. Ry. Co.*, (C.C.A. 9), 233 F. 239, this Court, in denying a recovery to a workman engaged in driving a tunnel, which when

completed was to become a part of the railroad's interstate system, said at Page 241:

"We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce. To the state of facts which is here presented on the pleadings, the language of the Supreme Court in the Pederson Case is applicable. The court said:

'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such'."

The Supreme Court decision, sustaining this Court, is found in 243 U.S. 43. In *New York Central Railroad Co. v. Sarah White*, 243 U.S. 188, the employee, a night watchman charged with the duty of guarding tools and materials used in the construction of a new station and new tracks upon the line of an interstate railroad, was held not to be covered by the Federal Employers' Liability Act. The Su-

preme Court stated at Page 191 as follows:

“The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal Act. The test is ‘Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?’ *Shanks v. Delaware, L. & W. R. Co.* 239 U.S. 556, 558, 60 L. ed. 436, 438, L.R.A. 1916C, 797, 36 Supp. Ct. Rep. 188. Decedent’s work bore no direct relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152, 57, L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N.C.C.A. 779. And see *Chicago, B. & Q. R. Co. v. Harrington*, 241 U.S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N.C.C.A. 992; *Raymond v. Chicago, M. & St. P. R. Co.* this day decided (243 U.S. 43, ante, 583, 37 Sup. Ct. Rep. 268). The first point, therefore, is without basis in fact.”

The recent decision by the First Circuit Court of Appeals in *Nieves et al. v. Standard Dredging Corporation*, *supra*, clearly supports the appellee’s position the appellant employees were not engaged in commerce or the production of goods for commerce. In that case the plaintiffs were employees of a subcontractor carrying on dredging operations in connection with the construction of a United States Naval base. The Court in discussing the “in commerce” issue said:

“The work upon which the plaintiffs were en-



gaged was not repair or maintenance to an existing dry dock and channel; it was new and original construction in preparing a site for such a dock and passageway to it, which had not yet been used in interstate commerce. Thus we feel that the *Raymond* case is controlling and that the plaintiffs were not engaged in commerce within the meaning of the Fair Labor Standards Act."

The appellants' additional contention that the construction work at the Puget Sound Navy Yard was in effect an improvement to a "highway of interstate commerce", as was the work in the case of *Walling v. Patton-Tulley Transportation Co.*, (C.C.A. 6) 134 F. (2d) 945, is without merit. As shown by the evidence, the work in this case was for improvements to the Navy Yard and were not improvements to facilitate navigation on Puget Sound.

In order for the claimants to recover on the theory they performed services in commerce it is necessary for them to show by a preponderance of the evidence that they were actually engaged in commerce, or that their activities were so closely related to the movement of commerce as to be a part of it. *McLeod v. Threlkeld et al.*, 319 U.S. 491. In this case the Supreme Court, denying a recovery to a cook preparing and serving meals to maintenance-of-way employees of an interstate railroad, in pursuance of a



contract between the employer and the railroad company, because the cook was not "engaged in commerce" as defined by the Act, said at page 497:

"The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'"

In *Armour & Co. v. Wantock et al.*, 323 U.S. 126, 131, the Court in distinguishing the *McLeod* case said:

"*McLeod v. Threlkeld*, 319 U.S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce,' and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

The undisputed evidence is that ninety-six percent (96%) of the construction materials were obtained locally and approximately four percent (4%) of the materials used were ordered and received from outside the State of Washington (R. 49). Some of the interstate shipments of materials went to ap-

pellees' warehouse in Seattle and some directly to the warehouse at Bremerton (R. 49). The appellants did not produce evidence of the amounts of either the intrastate or interstate shipments which were received directly at Bremerton (R. 50). It is admitted the claimants, with the possible exception of Henry I. Mayer and William J. Sheffield, had nothing to do with the receipt or handling of materials (R. 51) until after the materials had arrived and were at the appellees' warehouse. None of the claimants were employed in the warehouses. The evidence is clear that the appellees were the ultimate consumers of the goods and the materials had reached their final destination and had come to rest. Any work which the claimants may have performed in connection with the materials after their receipt by the appellees at the warehouse or on the job site was a local transaction and not within the scope of the Act. *Higgins v. Carr Brothers Co.*, 317 U.S. 572; *Domenech v. Pan American Standard Brands*, 147 F. (2d) 994.

Claimants John W. Jameson had no duties except as head timekeeper (R. 6, 50). He never had any connection, either directly or indirectly, with the movement of goods in commerce. Like the cook in *McLeod v. Threlkeld*, *supra*, and the head timekeeper in *Damon v. Ford, Bacon & Davis*, *supra*, his activities

were too remote from any movement of commerce to be a part thereof.

Claimants A. W. Hall, Ralph O. Lund, Paul Mehner, Glenn E. Tyler and A. W. Torn also had no direct connection with the movement of materials required for the construction work. They were employed as draftsmen and performed various additional duties such as inspection and field engineering. As one of their incidental duties they estimated the amount of supplies to be ordered and submitted their estimates to appellees' purchasing agent who placed all orders. So far as appears they did not specify sources of supply. That their work in estimating supplies needed may have affected interstate commerce is not enough to indicate coverage. *Kirschbaum v. Walling, supra*; *McLeod v. Threlkeld, supra*. On the record before the Court, it was not shown that any substantial part of claimants' activities related to interstate commerce as required by the rule announced by the Supreme Court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. In fact, it was not shown that *any* of the activities of claimants were so closely related to commerce as to be part thereof within the test established in the *Threlkeld* case.

In the case of Mayer and Sheffield the evidence is that they were principally engaged in performing

duties as timekeepers working on the "swing shift", and because there was no material clerk on that shift during part of the time, checked and receipted for and oversaw the unloading of intrastate and interstate shipments that arrived on the job during their hours of work (R. 50). There is no evidence to establish the times or dates during which there was no material clerk on their shift and the record is barren of any testimony as to the time spent by the said claimants in checking material shipments, either intrastate or interstate (R. 50). To arrive at any estimate as to whether or not Mayer and Sheffield were substantially or regularly engaged in activities related to receipt of interstate goods, the Court must indulge in conjecture and speculation. There is no evidence as to how much time the material clerk was absent. Nor is there any evidence that interstate shipments arrived regularly and not merely sporadically and infrequently during his absence. As in the case of the draftsmen, the record fails to show that a substantial part of the timekeepers' activities related to interstate commerce as required by the rule of the *Jacksonville Paper Co.* case. Their relationship to interstate shipments was insignificant being merely casual, irregular, and sporadic and clearly falls within the *de minimis* rule.



The Judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

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*Assistant United States Attorney*

TOM A. DURHAM  
*Assistant United States Attorney  
Attorneys for Appellees.*





No. 11154

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FRANK M. WEBER,

Appellant,

vs.

EVA M. WELLS, OGLA K. NEWPORT, ERN-  
EST H. KREYENHAGEN, JENNIE MAY  
MERRILL MILLER, ALMA H. SILVA,  
LILLIAN ARNEY, LOWELL HERIFORD,  
WALTER MERRILL and PAUL MERRILL,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

NOV 30 1945

PAUL P. O'BRIEN,



No. 11154

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United States  
Circuit Court of Appeals  
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FRANK M. WEBER,

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EVA M. WELLS, OGLA K. NEWPORT, ERN-  
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Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for  
the Northern District of California, Southern  
Division

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 acres of land in the City and County of San  
Francisco, State of California, CARRIE F.  
REDNALL, WILLIAM W. REDNALL,  
FLORA VAN DEN BERGH, CALIFORNIA  
A. SCOTT, MATILDA P. ANDREWS,  
MURIEL A. BRANHAM, JOHN S. KEP-  
NER, HARVEY M. TOY, SOUTH SAN  
FRANCISCO DOCK CO., BETHLEHEM  
SHIPBUILDING CO., MARY WARD,  
ROSE RYAN, GEO. P. CHAN, MARGARET  
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ELEVENTH DOE CORPORATION,  
TWELFTH DOE CORPORATION, THIR-  
TEENTH DOE CORPORATION, FOUR-  
TEENTH DOE CORPORATION, FIF-  
TEENTH DOE CORPORATION, SIX-  
TEENTH DOE CORPORATION, SEVEN-  
TEENTH DOE CORPORATION, EIGHT-  
EENTH DOE CORPORATION, NINE-  
TEENTH DOE CORPORATION, TWEN-  
TIETH DOE CORPORATION,

Defendants.

[3]

### COMPLAINT IN CONDEMNATION

Now comes the United States of America, by M. Mitchell Bourquin, Special Assistant to the Attorney General, at the direction and under the authority of the Attorney General of the United States and pursuant to the request of the Acting Secretary of the Navy, and for cause of action against the above named defendants, alleges as follows:

#### I.

That this proceeding is instituted and the lands hereinafter described are taken pursuant to the provisions contained in the Act of Congress approved July 19, 1940 (Public Law No. 757, 76th Congress, 3rd Session), which Act authorizes the acquisition of land for naval purposes, and the Second War Powers Act of 1942 (S. 2208, 77th Congress, 2nd Session).

## II.

That the lands hereinafter described are taken and condemned under the authority of the above mentioned Act of Congress, for the uses and purposes authorized by said act and are sought and taken for the expansion of facilities at the present Naval Dry Dock Hunter's Point, San Francisco, California, and are suitable and necessary for said purpose; that said use of said lands constitutes a public use and said lands have been selected by the Secretary of the Navy for acquisition for said purposes and uses above stated and are required for immediate use in order that the necessary work may be begun thereon for carrying out said purposes and uses.

## III.

That the acquisition of said lands by plaintiff will be of the greatest public benefit and the least [4] private injury; that no part of said lands has heretofore been appropriated for public use by said plaintiff, or the State of California, or any political subdivision thereof.

## IV.

That the estate or interest which plaintiff seeks to take and condemn in the lands hereinafter described is the fee simple title to said lands, hereinafter described.

## V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just compensation for the lands sought to be taken and

condemned herein in whatever sum may be ultimately awarded in the proceeding for the taking of said lands and any damages resulting therefrom.

## VI.

That the lands to be taken and condemned in this proceeding aggregate 230.5 acres, more or less, are situate in the City and County of San Francisco, State of California, and more particularly described as follows: [5]

Beginning at the point of intersection of the northeasterly line of Oakdale Ave. and the southeasterly line of Fitch Street, said point also being the northwesterly corner of Block 4725 as shown on that certain map entitled, "Naval Dry Docks, Hunter's Point, California, Acquisition of land," Numbered C-1892-5 and prepared by the Public Works Administration and from said point of beginning southeasterly along the northeasterly line of Oakdale Ave. and the projection thereof to a point which is the point of intersection of the line projected from the northeasterly line of Oakdale Ave. and the United States Bulkhead line; thence in a northeasterly direction along said United States Bulkhead Line to a point which is the point of intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunter's Point Naval Dry Docks; thence northwesterly along said southwest boundary line to a point which is the most westerly corner of the lands of said Hunter's Point Naval Dry Docks; thence northeasterly along the northwesterly boundary



line of Hunter's Point Naval Dry Docks to a point which is the point of intersection of said northwesterly boundary line and the United States Bulkhead Line; thence along said United States Bulkhead Line to a point which is the point of intersection of said United States Bulkhead Line and the southeasterly line of Coleman Street; thence southwesterly along the southeasterly line of said Coleman Street to a point which is the point of intersection of said southeasterly line of Coleman Street and the southwesterly line of McKinnon Ave.; thence northwesterly along the southwesterly line of McKinnon Ave. to a point which is the point of intersection of the southwesterly line of McKinnon Ave. and the southeasterly line of Earl Street; thence southwesterly on the southeasterly line of Earl Street to a point which is the point of intersection of said southeasterly line of Earl Street and the southwesterly line of Newcomb Ave.; thence northwesterly on the southwesterly line of Newcomb Ave. to a point which is the point of intersection of the southwesterly line of Newcomb Ave. and the southeasterly line of Fitch Street; thence southwesterly along the southeasterly line of Fitch Street to a point which is the point of intersection of the southeasterly line of Fitch Street and the northeasterly line of Oakdale Ave. said point being the point of beginning containing 230.5 acres, more or less. [6]

## VII.

That a plan showing the lands taken as above described is attached hereto, marked Exhibit "A", and made a part hereof by reference.



## VIII.

That plaintiff is informed and believes and therefore alleges that none of said lands taken by this proceeding are a part of any larger tract belonging to the apparent or purported owners of said lands herein described.

## IX.

Each of the defendants above named claims to be the owner of a portion of the property subject of this action, or has or claims to have some interest therein.

## X.

That so far as is known to plaintiff, the only persons, firms or corporations having or claiming any interest in the above described property and who are therefore joined as defendants, are the following: City and County of San Francisco, and State of California.

## XI.

That the defendants Second Doe to Twentyfifth Doe, inclusive, and First Doe Corporation to Twentieth Doe Corporation, inclusive, are sued and designated herein by fictitious names for the reason that their true names are unknown to plaintiff, but the plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by appropriate amendment, and prays such leave of the Court; that said defendants, and each [7] of them, may have or claim to have an interest in some piece or parcel of the lands sought to be taken and condemned in this action, but that the nature,

character or extent of such interest is unknown to plaintiff.

## XII.

That the Acting Secretary of the Navy has determined that it is necessary, advantageous and in the interests of the United States that an order be obtained from this Court authorizing said Navy Department to take immediate possession of the above described lands to the extent of the interest above described, and the above mentioned Special Assistant to the Attorney General has been authorized and directed by the Attorney General of the United States to take proper proceedings herein to acquire such order from this Honorable Court.

Wherefore, plaintiff prays:

1. For an order authorizing and directing the United States to take immediate possession of the above described lands.

2. For judgment:

- (a) Decreeing that said lands above described, to the extent of the title and interest which plaintiff seeks to acquire by this action, are condemned for necessary public uses of the plaintiff as authorized by law; that all of said lands are necessary and suitable thereto;

- (b) Determining the value of the lands subject of this action and each separate interest therein and directing the payment for each separate interest to the persons entitled thereto. [8]

3. For such other and further relief as the Court may deem meet and proper in the premises.

M. MITCHELL BOURQUIN

Special Assistant to the At-  
torney General

Attorney for Plaintiff [9]

### VERIFICATION

United States of America )

Northern District of California ) ss.

City and County of San Francisco )

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States, and attorney for the plaintiff in the above action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

That the reason why this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign.

That the sources of affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States and from the Navy Department of the United States.

M. MITCHELL BOURQUIN

Special Assistant to the At-  
torney General

Subscribed and sworn to before me this 4th day of April, 1942.

[Seal]                      LOUIS V. VASQUEZ

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 4, 1943. [10]

(Map Attached to Original Complaint) Exhibit "A"

[Endorsed]: Filed at 11:40 a.m. Apr. 4, 1942.

[10a]

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[Title of District Court and Cause.]

ORDER GRANTING IMMEDIATE POSSESSION AND USE OF PROPERTY SOUGHT TO BE CONDEMNED

Upon reading and filing the Complaint in the above entitled action, and in appearing that application has been made by plaintiff to be let into immediate possession of the lands described in the Complaint, and hereinafter described, and to take and make use of the quantum of estate and interest sought to be condemned as alleged in said Complaint, to the extent and for the purposes as alleged in said Complaint, and to proceed thereon with the public work authorized by Congress and directed by the Acting Secretary of the Navy and the Attorney General of the United States in the manner as set forth in said Complaint, and it further appearing that certain and adequate provision has been made for payment of just compensation to the



parties entitled thereto by previous appropriation of the Congress of the United States for that purpose:

Now, Therefore, It Is Ordered and Directed that leave be, and is hereby granted the United States of America to take immediate possession and use of the lands described in the Complaint herein, and hereinafter described, to the extent of the estate and interest to be acquired by the United States of America, to-wit, the fee simple title to said lands hereinafter described, for the expansion of facilities at the present Naval Dry Docks Hunter's Point, San Francisco, California, and plaintiff is hereby authorized to proceed with such public works thereon as have been authorized by Congress;

It Is Further Ordered and Directed that inasmuch as the United States of America has made certain and adequate provisions for the payment of just compensation [14] to the party or parties entitled thereto by virtue of appropriations made by Congress therefor, as set forth in the Complaint on file herein, it shall not be necessary that the United States of America deposit, or cause to be deposited any sum or sums of money, or other form of security of any kind or nature for the purpose of securing the payment of just compensation to the party or parties entitled thereto.

The United States Marshal is hereby authorized to place plaintiff in possession of said property.

Following is a particular description of the lands affected by this order, which said lands are situate



in the City and County of San Francisco, State of California: [15]

Beginning at the point of intersection of the northeasterly line of Oakdale Ave. and the southeasterly line of Fitch Street, said point also being the northwesterly corner of Block 4725 as shown on that certain map entitled "Naval Dry Docks, Hunter's Point, California, Acquisition of land," Numbered C-1892-5 and prepared by the Public Works Administration and from said point of beginning southeasterly along the northeasterly line of Oakdale Ave. and the projection thereof to a point which is the point of intersection of the line projected from the northeasterly line of Oakdale Ave. and the United States Bulkhead line; thence in a northeasterly direction along said United States Bulkhead Line to a point which is the point of intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunter's Point Naval Dry Docks; thence northwesterly along said southwest boundary line to a point which is the most westerly corner of the lands of said Hunter's Point Naval Dry Docks; thence northeasterly along the northwesterly boundary line of Hunter's Point Naval Dry Docks to a point which is the point of intersection of said northwesterly boundary line and the United States Bulkhead Line; thence along said United States Bulkhead Line to a point which is the point of intersection of said United States Bulkhead Line and the southeasterly line of Coleman Street; thence southwesterly along the southeasterly line of said Coleman Street to a

point which is the point of intersection of said southeasterly line of Coleman Street and the southwesterly line of McKinnon Ave.; thence northwesterly along the southwesterly line of McKinnon Ave. to a point which is the point of intersection of the southwesterly line of McKinnon Ave. and the southeasterly line of Earl Street; thence southwesterly on the southeasterly line of Earl Street to a point which is the point of intersection of said southeasterly line of Earl Street and the southwesterly line of Newcomb Ave.; thence northwesterly on the southwesterly line of Newcomb Ave. to a point which is the point of intersection of the southwesterly line of Newcomb Ave. and the southeasterly line of Fitch Street; thence southwesterly along the southeasterly line of Fitch Street to a point which is the point of intersection of the southeasterly line of Fitch Street and the northeasterly line of Oakdale Ave. said point being the point of beginning containing 230.5 acres, more or less. [16]

The Court reserves the right hereafter to make such other and further orders, judgments and decrees herein as may be necessary in the premises.

Dated: This 4th day of April, 1942.

MICHAEL J. ROCHE

Judge, United States District Court, Northern District of California.

[Endorsed]: Filed April 4, 1942. [17]

[Title of District Court and Cause.]

## DECLARATION OF TAKING

Whereas, it has become necessary that the lands which are the subjects of condemnation in the above entitled proceeding be taken for immediate public use by the United States of America for the expansion of facilities at the present Hunters Point Naval Dry Dock, San Francisco, California, upon the filing of this declaration of taking,

Now, Therefore, I, James Forrestal, Acting Secretary of the Navy, acting for and in the capacity of the Secretary of the Navy, under and pursuant to the provisions of the Acts of Congress approved January 29, 1942, (Public Law 420, 77th Congress; 55 Stat., Chap 25); Act of Congress approved February 7, 1942 (Public Law 441, 77th Congress; 55 Stat., Chap 46); [19] August 1, 1888 (25 Stat., 357; U. S. C., title 40, sec. 257); and February 26, 1931 (46 Stat., 1421; U. S. C., title 40, sec. 258a), do hereby make and cause to be filed this declaration of taking, pursuant to said acts of Congress and any acts amendatory thereof or supplementary thereto, and by virtue of authority thereof, do hereby state that I have selected for acquisition two hundred thirty and five tenths (230.5) acres of land, more or less, situated in the City of San Francisco, County of San Francisco, California, which said lands are shown on photostatic copy of map number C-1892-5, entitled "Navy Yard, Mare Island, California, Navy Dry Docks Hunters Point, California, Acquisition of Land," which is attached

hereto as Exhibit "A" and made a part of this declaration of taking. Said lands are more particularly described as follows:

Beginning at the point of intersection of the Northerly line of Oakdale Avenue and the Southeasterly line of Fitch Street, said point also being the Northwesterly corner of Block 4725 as shown on Exhibit "A", and from said point of beginning Southeasterly along the Northeasterly line of Oakdale Avenue and the projection thereof to a point which is the point of intersection of the line projected from the Northeasterly line of Oakdale Avenue and the United States Bulkhead Line; thence in a Northeasterly direction along said United States Bulkhead Line to a point which is the point of intersection of the United States Bulkhead Line and the Southwesterly boundary line of the Hunters Point Naval Dry Docks; thence Northwesterly along said Southwest boundary line to a point which is the most Westerly corner of the lands of said Hunters Point Naval Dry Docks; thence Northeasterly along the Northwesterly boundary line of Hunters Point Naval Dry Docks to a point which is the point of intersection of said Northwesterly boundary line and the United States Bulkhead line; thence along said United States Bulkhead Line to a point which is the point [20] of intersection of the said United States Bulkhead Line and the Southeasterly line of Coleman Street; thence Southwesterly along the Southeasterly line of said Coleman Street to a point which is the point of intersection of said Southeasterly line of Coleman Street and the Southwesterly line of McKinnon



Avenue; thence Northwesterly along the Southwesterly line of McKinnon Avenue to a point which is the point of intersection of the Southwesterly line of McKinnon Avenue and the Southeasterly line of Earl Street; thence Southwesterly on the Southeasterly line of Earl Street to a point which is the point of intersection of the said Southeasterly line of Earl Street and the Southwesterly line of Newcomb Avenue; thence Northwesterly on the Southwesterly line of Newcomb Avenue to a point which is the point of intersection of the Southwesterly line of Newcomb Avenue and the Southeasterly line of Fitch Street; thence Southwesterly along the Southeasterly line of Fitch Street to a point which is the point of intersection of the Southeasterly line of Fitch Street and the Northeasterly line of Oakdale Avenue, said point being the point of beginning, containing 230.5 acres of land, more or less.

And I do declare said lands to be taken under authority of the aforesaid acts of Congress; that the use to which said lands are to be put is the same as authorized by said acts; and that the estate hereby taken in said lands for the public use aforesaid is in fee simple,

And I, James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for all of said lands, improvements thereon and appurtenances thereunto belonging, is Seven Hundred Fifty-five Thousand, Three Hundred and 86/100 dollars (\$755,300.86), which said sum having been



appropriated by Congress is hereby deposited into the registry of the court for the use and [21] benefit of the persons entitled thereto, and that the names of the owners of said property or interest therein and the amount of just compensation for said lands and improvements thereon, which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the said James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has caused this declaration of taking to be signed in its name and has caused the seal of the Navy Department to be affixed hereto on the 15th day of April, 1942, in the City of Washington, District of Columbia.

[Seal]

UNITED STATES OF AMERICA

By JAMES FORRESTAL

Acting Secretary of the Navy.

[22]

## SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Owner	Block Number	Lot Number	Estimated Fair Compensation
Bethlehem Shipbuilding Company	4592	1,2,4	\$ 4,200.00
Mary Ward and Rose Ryan	4592	3	640.00
George P. Chan	4610	1	21,133.60
Mark E. Noon	4611	1	1,200.00
Albert Gianelli	4611	2	2,577.60
Bethlehem Shipbuilding	4611	3,4,5 6,7,8 10,14, 15,16, 19,20, 21	8,549.60
Walter Merrill, et al	4611	9	900.00
Shun Chuck Poy	4611	11	8,857.60
Kate C. Towle	4611	12	600.00
Janet McLeod	4611	13	300.00
Janet McLeod	4611	22	1,020.00
			[23]
Mark E. Noon	4611	17	900.00
George Hansen	4611	18	900.00
Warren Powers	4616	1	1,200.00
Bethlehem Shipbuilding Company	4616	2 to 10 incl., 12,14 to 17	13,298.00
Jennie M. Merrill, et al	4616	11	1,050.00
Lily Lerman	4616	13	900.00
Charles E. Long	4617	1	1,360.00
Walter S. Newhall	4617	2	1,116.00
Elmer A. Fridley	4617	3	320.00
Warren Powers	4617	3A,4	7,401.52

## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
Edward J. Callan	4617	3B	\$ 760.08
Agostine Zari	4617	4A	466.80
Simon G. Bube	4617	4B,5	1,291.40
August H. Siemer	4617	6	1,976.20
Kernan Robson	4617	7A	703.24
James R. Martin	4617	7B	586.40
Agostino Zari	4617	8	600.00
George C. Ahlborn	4617	8A	600.00
Warren Powers	4617	8B	600.00
Chuck Lincoln Minor	4617	9	3,900.00
Percy A. Molfino	4617	9A	600.00
George Yaksich	4617	9B	640.00
South San Francisco Dock Company	4617	10,11	1,440.00
Check Way Hin	4617	12	480.00
			[24]
Louis Verkich	4617	12A	400.00
Vito Chiala	4617	13,13A, 14	21,886.00
Steve Poklar	4617	14A	755.60
Fred Assalino	4617	14B,15	10,860.80
William W. Witney	4617	16A	258.00
Kernon Robson	4617	16B	1.68
Mildred L. Goodsell	4634	1	980.00
Charles Gardner, et al	4634	2	900.00
Frank Mango	4634	3	3,748.80
Virgil Johnson	4634	4	560.00
Silas D. Harp	4634	4A	758.80
Houghton Company	4634	5,19	1,120.00
Angelo Castanzo	4634	5A	580.00
Daniel McSweeney	4634	6,7,8 9,15, 16,17	4,720.00
Clarence B. Eaton	4634	10	280.00
James M. Smith			
Andrew Zanetti	4634	11,12	560.00
Maria Karich	4634	13	3,405.00
Gian Vidlich	4634	14	240.00

## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
W. R. Jameson	4634	14A	\$ 2,385.50
J. M. Klobucar	4634	18	960.00
Virginia Barca	4634	20	560.00
John Gauci	4634	20A,21	560.00
Charles Madgwick	4634	21A	660.00
Frank Machado	4634	21B	280.00

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Alfred Seligman	4635	1	3,148.00
Walter J. Silva	4635	2,3, 3A,4	1,560.00
M. E. Gorter	4635	5,6, 14A,15	2,040.00
Joseph D. Toohig	4635	7	720.00
William L. Brown	4635	8,9	1,500.00
Chan Lam	4635	10,11	5,064.00
Edgar McLaren	4635	12	600.00
Helen V. Mau	4635	13,13A 13B	2,789.60
Beatrice Cuneo	4635	14	200.00
State of California	4635	15	200.00
James I. Downey, et al	4635	17	200.00
J. G. James Co.	4635	18	600.00
Orral E. Carrere	4640	1	320.00
Peter Lors, et al	4640	1A	160.00
Arthur Viargues	4640	2,2A	360.00
Charles Bevan	4640	3	280.00
Mary Cunningham	4640	4	468.00
Donald Stuart	4640	5,17A	1,084.00
Ralph C. Smith	4640	5A	1,535.20
Edward Bergold	4640	6	440.00
Albert W. McKinney	4640	7	3,317.60
Hu Wai Kee	4640	8	6,680.00
Paul Nelson	4640	9	440.00
Rose Cavanagh			
Olive Wilson	4640	10	220.00

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## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
J. L. Tomkins	4640	10A	\$ 2,820.00
Rex R. Wilson	4640	10B	220.00
Byron B. Tomkins	4640	10C	\$ 2,736.80
M. Roodhouse	4640	11	720.00
Loo Yee Ling Shee	4640	12	780.00
Jack Robinson	4640	13	1,564.80
Pedro Longa	4640	14	240.00
Rosa M. Bayer	4640	14A	480.00
Jane M. O'Gara	4640	17	2,216.00
Herbert F. Buckley	4640	18	5,240.00
Moses Yang	4641	1	405.00
William W. Browne	4641	1A	2,129.60
Mary C. Hogan	4641	2	1,612.00
Odie Sterner	4641	2A	2,201.60
Louis Colton	4641	3	560.00
Joseph Yaich	4641	3A,4	2,944.00
Mary E. Christiansen	4641	4A	1,140.00
Arthur F. Stevens	4641	5	451.20
Albert Lise	4641	5A	280.00
Sophie Hamilton	4641	5B	2,416.80
A. A. Cornell	4641	6	280.00
M. Diehl	4641	6A	280.00
Jennabelle Delaney	4641	6B	280.00
Till Toms	4641	7,7A,7B	840.00
Oscar Lewis	4641	8	280.00
			[27]
David LeVake	4641	8B	280.00
Thomas A. Nelson	4641	8A	280.00
Claire Brown	4641	9	420.00
Gardner A. Dailey	4641	9A	440.00
Warren Whitney	4641	10,11	860.00
George G. Molena	4641	11,12	840.00
Raoul Bozio	4641	14	840.00
I. J. Piazza	4641	15	2,453.60
Paul Paulini	4641	15A	5,332.00
Seferino Rivera	4641	16	560.00
Ameda Grappali	4641	17	860.00
City of San Francisco	4658	1	2,320.00
Thomas Merculis	4658	2,2A	1,826.00
Enka Winup	4658	2B,3	1,044.00
Arthur B. Willis	4658	3A,3B	400.00



## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
South San Francisco Dock Company M. Burns	4658	4,5	\$ 840.00
Ray T. Burke	4658	6	200.00
John Miley	4658	6A,6B	1,982.40
Joseph D. Toohig	4658	7,8	1,200.00
F. D. Stoller	4658	9	720.00
Oscar Lewis	4658	10	960.00
Juanita Dowd	4658	11,12	1,680.00
Pedro Nava	4658	13,13A,13B	840.00
Robert Gain	4658	14	1,080.00

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William P. Shields	4658	14A,15	1,640.00
Arthur P. Stevens	4658	15A	1,600.00
Maud McLaughlin	4658	16	840.00
G. W. McKinney	4659	1	207.60
Patricia C. Kirk	4659	1A	207.60
State of California	4659	2	420.00
Emile Nagard	4659	3	821.60
G. W. McKinney	4659	3A	1,182.60
Amanda W. Felt	4659	4	420.00
Amanda W. Felt	4659	15	420.00
Karl A. Karn	4659	5	420.00
Karl A. Kern	4659	14	420.00
M. Diehl	4659	6	400.00
Fred D. Carrier	4659	6A	200.00
E. Stevenson	4659	7	600.00
H. S. Smith	4659	8,8A	720.00
J. F. Dowling	4659	8B	200.00
Madeline Burke	4659	9	1,320.00
Reint Lingerma	4659	9A,9B	1,820.00
Fred I. Kemm	4659	10,10A	440.00
Rudolph Palm	4659	10B	220.00
J. F. Dowling	4659	11	600.00
Albert Fernandez	4659	12	1,375.20
E. J. Jackson	4659	12A	1,220.80
Eva M. Dillon	4659	13	200.00
Albert L. Johnson	4659	13A	280.00

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## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
Florence G. Perrin	4659	16	\$ 420.00
South San Francisco Dock Company	4665	1	2,520.00
Claude Rosenberg et al.	4665	2,9	840.00
City Title Insurance Company	4665	3,3A, 8,8A,2B	1,092.00
Abbey Frink Bickel	4665	4,7	840.00
Walter Sarlin	4665	5	140.00
Dominic Serio	4665	5A,5B	180.00
J. F. Dowling	4665	6	420.00
George M. Moore	4665	10	460.00
Cal. Scott, et al	4665	11,12	428.00
Katherina Stauffer	4666	1,3,17, 18	1,600.00
William T. G. Jordan	4666	2,4	640.00
Walter F. Sarlin	4666	5	320.00
John O'Neil	4666	5A	922.00
Naomi E. Lee	4666	6	1,126.40
James Greco	4666	7	480.00
William Ede Company	4666	8,13	960.00
Bernard Bernardo	4666	9	160.00
Joseph Barajas	4666	9A	1,300.00
Ray T. Burke	4666	9B	160.00
Cornelius Tamony	4666	10,11	1,080.00
Joseph Arevalo	4666	12	1,058.72
Alfred M. Conley	4666	12A	600.00
Jose Cesena	4666	12B	180.00
[30]			
Shilling Est. Company	4666	14	480.00
Nick Pork	4666	15,16B	480.00
August Pieresz	4666	15A	160.00
John Rosado	4666	15B	160.00
Robert W. Chase	4666	16,16A	794.48
Thomas A. Ryan	4683	1,2	1,080.00
Walter F. Sarlin	4683	3,3A	2,480.00
Walter F. Sarlin	4683	16,16B	320.00
Gino L. Dentesano	4683	4,5,5A 5B	1,788.00

## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
Raymond F. Gillette	4683	6,6A,6B	\$ 3,258.40
Joseph Valez	4683	7	400.00
Rafela Valez			
S. Rivera	4683	7A	1,140.00
F. Rivera			
J. Portelo	4683	8,8A	400.00
C. Burdick	4683	8B	200.00
C. Burdick	4683	9	1,680.00
C. F. McCann	4683	9A	1,605.60
Minnie Hildbrecht	4683	10,14	1,200.00
Katherina Stauffer	4683	11	480.00
Joehin Sass	4683	12	480.00
Cornelius Tamony	4683	13	480.00
Houghton Company	4683	15	480.00
Manuel Farrell	4683	16A	1,048.00
South San Francisco	4684	1	
Dock Company			[31]
Andrew D. Zanetti	4684	1A,2,2A	5,080.00
William T. G. Jordan	4684	3	200.00
Marie S. Sigall	4684	4	400.00
Helen S. Smith			
Alice M. Begley	4684	5	440.00
Herbert C. Rodenberger	4684	6	420.00
Lily O'Connor, et al	4694	1,2	1,020.00
Oscar Sarlin	4694	3	420.00
Katherina Stauffer	4694	4,5,6,7, 8,9,16	3,120.00
Mercantile Trust Co.	4694	10	600.00
Alfred Tobin, Trs.	4694	11,12 13,14	2,400.00
Dorothy Jones	4694	15	200.00
Dorothy Jones	4694	15A	1,400.00
Ray T. Burke	4694	15B	1,320.00
South San Francisco	4590		
	4593		
	4610		
	45764		
	4591		
	4592		

## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
	Tract Number		
South San Francisco	4663		
Dock Company	4664		
	4665		
	4684		
	4685		
	4686		
	4692		
	4693		
	4708		
	4709		
	4710		
	4711		
	4712		[32]
	4713		
	4720		
	4721		
	4722		
	4723		
	4724		
	4725		427,571.20
Estate of James M. McDonald	4567		1,448.00
c/o Mrs. Blythe McDonald			
Hayden,			
Los Angeles, Calif.			
Flora Vandenberg	4575		1,696.00
Western Title Ins. Co.,			
Muriel A. Branham, et al			
Stuart Kepner	4576A		1,696.00
Harvey M. Toy			
Muriel A. Branham, et al			
Muriel A. Branham, et al	4590		200.00
Estate of James M.	4662		957.00
McDonald			
Peter Dean Company	4663		295.80
Betty J. Horn	4686		696.00
Hermenda Joost			
Lester L. Roth			
Rennee Bransten			

## Schedule "A"—(Continued)

Owner	Block Number	Lot Number	Estimated Fair Compensation
Henry Investment Co., c/o Thornwall Mullally, Crocker First National Bank Building	4687		957.00
Henry Investment Co.	4688		149.64
	4689		334.08
	4690		957.00
Muriel A. Branham, et al	4691		957.00
Phillip Paschel			
Muriel Jacobs	4692		62.64
Wells Fargo Bank & Union Trust Company	4713		476.76
			[33]
James Madison Estate Company, Matilda T. Altvater Sarah Gleeson	4714		957.00
Robert W. Kelley	4715		957.00
Winifred S. Kelly			
Elma D. Goodman			
Walter E. Dakin			
Elsa Everding			
James S. Hutchinson	4716		528.96
C. A. Wellman	4717		772.56
John H. Stahl	4718		957.00
State of California	4719		957.00
Elizabeth Harms			
Johanna E. MacNicol			
Martha Chase Holland			
Nellie Barrett, et al	4720		888.40
Rosa Cheim, et al			
City of San Francisco, California			1.00

For any and all right, title and interest in  
and to the land described in the attached de-  
claration of taking and appurtenances there-  
unto belonging.

Total.....\$755,300.86

[34]



[Title of District Court and Cause.]

## JUDGMENT

The United States of America having this day made application to the Court to enter a Judgment on the Declaration of Taking heretofore filed this day, and for an Order fixing the date when possession of the property herein described is to be surrendered to the United States of America and upon consideration thereof and of the Condemnation Complaint filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed for in said Complaint;

Second: That a Complaint in Condemnation was filed at the request of the Acting Secretary of the Navy, and authority empowered by law to acquire the land described in said Complaint, and also under authority of the Attorney General of the United States;

Third: That said Complaint and Declaration of Taking state the authority under which, and the public use for which said land was taken, that the Acting Secretary of the Navy is the person duly authorized and empowered by law to acquire land such as is described in the Complaint for use by the United States of America for the expansion of facilities at the present Hunter's Point Naval

Dry Dock, San Francisco, California, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings. [38]

Fourth: That a proper description of the lands sought to be taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement of the estate or interest in said lands taken for such public use;

Sixth: That a plan showing the lands taken is incorporated in said Declaration of Taking;

Seventh: That a statement is contained in said Declaration of Taking of a sum of money estimated by said Acting Secretary of Navy to be just compensation for said land in the amount of Seven Hundred Fifty-Five Thousand Three Hundred and 86/100 Dollars (\$755,300.86) and that said sum was deposited in the Registry of this Court for the use of the persons entitled thereto, upon and at the time of the filing of said Declaration of Taking;

Eighth: That a statement is contained in said Declaration of Taking that the amount of the ultimate award for compensation for the taking of said property, in the opinion of said Acting Secretary of the Navy of the United States of America, will be within any limits prescribed by Congress as to the price to be paid therefor;

Ninth: That the land hereinafter described which is the subject of this action, consists of a number of smaller lots or parcels in a number of different ownerships; that the names of the persons

having title to or other interest in the lands hereinafter described, a description of their respective lots or parcels, and the amounts estimated to be fair compensation for each respective ownership [39] including all improvements thereon, are shown on Schedule "A" hereto attached and made a part of this Judgment:

Now, Therefore, It Is Ordered, Adjudged And Decreed that the title to those certain lands in the City and County of San Francisco, State of California, more particularly described as follows: [40]

Beginning at the point of intersection of the northeasterly line of Oakdale Ave. and the southeasterly line of Fitch Street, said point also being the northwesterly corner of Block 4725 as shown on that certain map entitled "Naval Dry Docks, Hunter's Point, California, Acquisition of Land," Numbered C-1892-5 and prepared by the Public Works Administration and from said point of beginning southeasterly along the northeasterly line of Oakdale Ave. and the projection thereof to a point which is the point of intersection of the line projected from the northeasterly line of Oakdale Ave. and the United States Bulkhead Line; thence in a northeasterly direction along said United States Bulkhead Line to a point which is the point of intersection of the United States Bulkhead Line and the southwesterly boundary line of the Hunter's Point Naval Dry Docks; thence northwesterly along said southwest boundary line to a point which is the most westerly corner of the lands of said Hunter's Point Naval Dry Docks; thence northeasterly

along the northwesterly boundary line of Hunter's Point Naval Dry Docks to a point which is the point of intersection of said northwesterly boundary line and the United States Bulkhead Line; thence along said United States Bulkhead Line to a point which is the point of intersection of the said United States Bulkhead Line and the southeasterly line of Coleman Street; thence southwesterly along the southeasterly line of said Coleman Street to a point which is the point of intersection of said southeasterly line of Coleman Street and the southwesterly line of McKinnon Ave.; thence northwesterly along the southwesterly line of McKinnon Ave. to a point which is the point of intersection of the southwesterly line of McKinnon Ave. and the southeasterly line of Earl Street; thence southwesterly on the southeasterly line of Earl Street to a point which is the point of intersection of said southeasterly line of Earl Street and the southwesterly line of Newcomb Ave.; thence northwesterly on the southwesterly line of Newcomb Ave. to a point which is the point of intersection of the southwesterly line of Newcomb Ave. and the southeasterly line of Fitch Street; thence southwesterly along the southeasterly line of Fitch Street to a point which is the point of intersection of the southeasterly line of Fitch Street and the northeasterly line of Oakdale Ave. said point being the point of beginning containing 230.5 acres, more or less.

[41]

vested in the United States of America in fee simple absolute, and the right to just compensation therefor vested in the persons entitled thereto, upon the



filing of said Declaration of Taking and the depositing in the Registry of this Court the sum of Seven Hundred Fifty-Five Thousand, Three Hundred and 86/100 (\$755,300.86), as hereinabove recited; that said lands are deemed to have been taken and condemned for the public use of the plaintiff as authorized by law and are necessary and suited to said use; that just compensation for the taking of said lands shall be ascertained and awarded by judgment herein.

It Is Further Ordered, Adjudged and Decreed that the United States of America and its agents are entitled to immediate possession of the above described property and defendants and all persons in possession of said property, or claiming an interest therein, are hereby ordered to surrender said property forthwith to the United States, and this cause is held open for such further orders and decrees as may be necessary in the premises.

Done in open Court, this 22nd day of April, 1942.

MICHAEL J. ROCHE,

Judge, United States District  
Court, Northern District of  
California. [42]

### SCHEDULE "A"

[Printer's Note: Schedule "A" attached to the Judgment is not reproduced here, as it is identical with Schedule "A" attached to the Declaration of Taking, and printed in full at pages 23 to 31 of this printed record.]

[Endorsed]: Filed April 22, 1942.



[Title of District Court and Cause.]

AMENDMENT TO DECLARATION  
OF TAKING

Whereas, the above-captioned condemnation proceeding has been instituted and a declaration of taking has been filed;

Whereas, subsequent information indicates that certain errors have been made in the estimation of the just compensation;

Now, Therefore, I, James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, pursuant to the leave of court first being obtained, do hereby cause to be filed an amendment to the declaration of taking in order to revise the amounts of estimated compensation as set forth in Schedule "A".

In Witness Whereof, the Petitioner, by and through the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy has caused this amendment to be signed and has caused the seal of the Department of the Navy to be affixed hereto on the 16th day of November, 1942, in the City of Washington, District of Columbia.

[Seal]

UNITED STATES OF AMERICA

By JAMES FORRESTAL

Acting Secretary of the Navy.

[56]

filing of said Declaration of Taking and the depositing in the Registry of this Court the sum of Seven Hundred Fifty-Five Thousand, Three Hundred and 86/100 (\$755,300.86), as hereinabove recited; that said lands are deemed to have been taken and condemned for the public use of the plaintiff as authorized by law and are necessary and suited to said use; that just compensation for the taking of said lands shall be ascertained and awarded by judgment herein.

It Is Further Ordered, Adjudged and Decreed that the United States of America and its agents are entitled to immediate possession of the above described property and defendants and all persons in possession of said property, or claiming an interest therein, are hereby ordered to surrender said property forthwith to the United States, and this cause is held open for such further orders and decrees as may be necessary in the premises.

Done in open Court, this 22nd day of April, 1942.

MICHAEL J. ROCHE,

Judge, United States District  
Court, Northern District of  
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AMENDMENT TO DECLARATION  
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Whereas, the above-captioned condemnation proceeding has been instituted and a declaration of taking has been filed;

Whereas, subsequent information indicates that certain errors have been made in the estimation of the just compensation;

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In Witness Whereof, the Petitioner, by and through the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy has caused this amendment to be signed and has caused the seal of the Department of the Navy to be affixed hereto on the 16th day of November, 1942, in the City of Washington, District of Columbia.

[Seal] UNITED STATES OF AMERICA

By JAMES FORRESTAL

Acting Secretary of the Navy.

[56]

## SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
1	Bethlehem Shipbuild-	4692	1,2,4	\$36,000.00
6	ing Company	4611	3,4,5	
			6,7,8	
			10,14	
			15,16	
			19,20	
			21	
15	Bethlehem Shipbuild-	4616	2 to 10	
	ing Company		incl.,	
			12,14 to	
			17	
2	Mary Ward and	4592	3	1,000.00
	Rose Ryan			
3	George P. Chan	4610	1	26,000.00
4	Mark E. Noon	4611	1	1,600.00
5	Albert Gianelli	4611	2	3,500.00
7	Walter Merrill, et al.	4611	9	1,250.00
8	Shun Chuck Poy	4611	11	12,000.00
9	Kate C. Towle	4611	12	1,000.00
10	Janet McLeod	4611	13	500.00
11	Janet McLeod	4611	22	1,300.00
12	Mark E. Noon	4611	17	1,650.00
13	George Hansen	4611	18	1,250.00
14	Warren Powers	4616	1	1,250.00
16	Jennie M. Merrill, et al.	4616	11	1,350.00
17	Lily Lerman	4616	13	1,125.00
[57]				
18	Charles E. Long	4617	1	1,700.00
19	Walter S. Newhall	4617	2	1,635.00
20	Elmer A. Fridley	4617	3	425.00
21	Warren Powers	4617	3A,4	9,500.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
22	Edward J. Callan	4617	3B	\$ 800.00
23	Agostino Zari	4617	4A	600.00
24	Simon G. Bube	4617	4B,5	1,614.25
25	August H. Siemer	4617	6	2,500.00
26	Kernan Robson	4617	7A	900.00
27	James R. Martin	4617	7B	750.00
28	Agostino Zari	4617	8	750.00
29	George C. Ahlborn	4617	8A	750.00
30	Warren Powers	4617	8B	750.00
31	Chuck Lincoln Minor	4617	9	5,000.00
32	Percy A. Molfino	4617	9A	750.00
33	George Yaksich	4617	9B	800.00
34	South San Francisco Dock Company	4617	10,11	1,800.00
35	Cheek Way Hin	4617	12	600.00
36	Louis Verkich	4617	12A	500.00
37	Vito Chiala	4617	13,13A, 14	27,000.00
38	Steve Poklar	4617	14A	950.00
39	Fred Assalino	4617	14B,15	13,500.00
40	William W. Witney	4617	16A	322.50
41	Kernan Robson	4617	16B	2.00
42	Mildred L. Goodsell	4634	1	1,200.00
43	Charles Gardner, et al.	4634	2	1,325.00
[58]				
44	Frank Magno	4634	3	4,550.00
45	Virgil Johnson	4634	4	6,000.00
46	Silas D. Harp	4634	4A	1,233.00
47	Houghton Company	4634	5,19	1,500.00
48	Angelo Costanzo	4634	5A	700.00
49	Daniel McSweeney	4634	6,7,8, 9,15 16,17	7,000.00
50	Clarence D. Eaton	4634	10	400.00
	James M. Smith			
51	Andrew Zanetti	4634	11,12	8,000.00
206		4684	1A,2,2A	
52	Maria Karich	4634	13	4,500.00
53	Gian Vidulich	4634	14	300.00



## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
54	W. R. Jameson	4634	14A	\$ 2,900.00
55	J. M. Klobucar	4634	18	1,200.00
56	Virginia Barca	4634	20	775.00
57	John Gauci	4634	20A,21	750.00
58	Charles Madgwick	4634	21A	975.00
59	Frank Machado	4634	21B	400.00
60	Alfred Seligman	4635	1	4,000.00
61	Walter J. Silva	4635	2,3 3A,4	2,000.00
62	M. E. Gorter	4635	5,6, 14A,15	2,500.00
63	Joseph D. Toohig	4635	7	900.00
64	William L. Brown	4635	8,9	2,000.00
65	Chan Lam	4635	10,11	6,500.00
66	Edgar McLaren	4635	12	750.00
67	Helen V. Mau	4635	13,13A 13B	750.00
				[59]
68	Beatrice Cuneo	4635	14	3,300.00
69	State of California	4635	16	250.00
70	James I. Downey, et al.	4635	17	250.00
71	J. G. James Company	4635	18	700.00
72	Oral E. Carrere	4640	1,1B	400.00
73	Peter Lore, et al.	4640	1A	200.00
74	Arthur Viargues	4640	2,2A	500.00
75	Charles Bevan	4640	3	400.00
76	Mary Cunningham	4640	4	550.00
77	Donald Stuart	4640	5,17A	2,165.00
78	Ralph C. Smith	4640	5A	2,975.00
79	Edward Bergold	4640	6	500.00
80	Albert W. McKinney	4640	7	4,360.00
81	Hu Wai Kee	4640	8	8,285.00
82	Paul Nelson	4640	9	550.00
	Rose Cavanaugh			
83	Olive Wilson	4640	10	300.00
84	J. L. Tomkins	4640	10A	3,900.00
85	Rex R. Wilson	4640	10B	220.00
86	Byron B. Tomkins	4640	10C	3,750.00
87	M. Roodhouse	4640	11	900.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
88	Loo Yee Ling Shee	4640	12	\$ 1,200.00
89	Jack Robinson	4640	13	1,564.80
90	Pedro Longa	4640	14	300.00
91	Rosa M. Bayer	4640	14A	600.00
92	Jane M. O'Gara	4640	17	2,800.00
93	Herbert F. Buckley	4640	18	6,500.00

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94	Moses Yang	4641	1	1,200.00
95	William W. Browne	4641	1A	3,050.00
96	Mary C. Hogan	4641	2	2,045.00
97	Odie Sterner	4641	2A	2,624.00
98	Louis Colton	4641	3	700.00
99	Joseph Yaich	4641	3A,4	3,750.00
100	Mary M. Christiansen	4641	4A	1,300.00
101	Arthur F. Stevens	4641	5	2,800.00
134		4658	15A	
102	Albert Lise	4641	5A	400.00
103	Sophie Hamilton	4641	5B	3,165.00
104	A. A. Cornell	4641	6	400.00
105	M. Diehl	4641	6A	350.00
106	Jessabelle Delaney	4641	6B	350.00
107	Till Toms	4641	7,7A,7B	1,500.00
108	Oscar Lewis	4641	8	825.00
109	David LeVake	4641	8B	
110	Thomas A. Nelson	4641	8A	400.00
111	Claire Brown	4641	9	625.00
112	Gardner A. Dailey	4641	9A	700.00
113	Warren Whitney	4641	10,11	1,350.00
114	George G. Molema	4641	12,13	1,500.00
115	Raoul Bozio	4641	14	1,150.00
116	I. J. Piazza	4641	15	3,500.00
117	Paul Paulini	4641	15A	5,332.00
118	Seferino Rivera	4641	16	750.00
119	Amedeo Grappali	4641	17	900.00
120	City of San Francisco	4658	1	1.00

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121	Thomas Merculis	4658	2,2A	2,100.00
122	Enka Winup	4658	2B,3	1,300.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
123	Arthur B. Willis	4658	3A,3B	\$ 500.00
124	South San Francisco Dock Company, M. Burns	4658	4,5	1,250.00
125	Ray T. Burke	4658	6	260.00
126	John Miley	4658	6A,6B	2,550.00
127	Joseph D. Toohig	4658	7,8	1,550.00
128	F. D. Stoller	4658	9	960.00
129	Oscar Lewis	4658	10	1,325.00
130	Juanita Dowd	4658	11,12	2,200.00
131	Pedro Nava	4658	13,13A,13B	1,200.00
132	Robert Gain	4658	14	1,500.00
133	William P. Shields	4658	14A,15	1,800.00
135	Maud McLaughlin	4658	16	1,050.00
136	G. W. McKinney	4659	1	300.00
137	Patricia C. Kirk	4659	1A	300.00
138	State of California	4659	2	1.00
139	Emile Nagard	4650	3	3,200.00
140	G. W. McKinney	4659	3A	
141	Amanda W. Felt	4659	4	1,160.00
142		4659	15	
143	Karl A. Kern	4659	5	1,000.00
144		4659	14	
145	M. Diehl	4659	6	500.00
146	Fred D. Carrier	4659	6A	250.00
147	E. Stevenson	4659	7	750.00
148	H. S. Smith	4659	8,8A	825.00

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149	J. F. Dowling	4659	8B	250.00
150	Madeline Burke	4659	9	1,925.00
151	Reint Lingerma	4659	9A,9B	2,300.00
152	Fred I. Kemm	4659	10,10A	600.00
153	Rudolph Palm	4659	10B	275.00
154	J. F. Dowling	4659	11	750.00
155	Albert Fernandez	4659	12	1,700.00
156	E. J. Jackson	4659	12A	2,000.00
157	Eva M. Dillon	4659	13	660.00
158	Albert L. Johnson	4659	13A	
159	Florence G. Perrin	4659	16	500.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
160	South San Francisco Dock Company	4665	1	\$ 2,060.00
161	Claude Rosenberg, et al.	4665	2,9	1,250.00
162-A	Jeanette Camp	4665	3	230.00
162-B	William Von Borstel	4665	3A,8	1,000.00
162-C	Harry S. Smith	4665	8A,8B	460.00
	Ray T. Burke			
163	Abbey Frink Bickel	4665	4,7	1,100.00
164	Walter Sarlin	4665	5	4,400.00
171		4666	5	
189		4683	3,3A	
190		4683	16,16B	
165	Dominie Serio	4665	5A,5B	500.00
166	J. F. Dowling	4665	6	625.00
167	George M. Moore	4665	10	600.00
168	Cal. Scott, et al.	4665	11,12	600.00
169	Katherina Stauffer	4666	1,3,17,18	1,600.00
170	William T. O. Jordan	4666	2,4	800.00
172	John O'Neil	4666	5A	1,050.00
173	Naomi E. Lee	4666	6	1,400.00
174	James Greco	4666	7	700.00

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175	William Ede Company	4666	8,13	1,400.00
176	Bernard Bernardo	4666	9	200.00
177	Joseph Barajas	4666	9A	1,750.00
178	Ray T. Burke	4666	9A	230.00
179	Cornelius Tamony	4666	10,11	2,300.00
202		4683	13	
180	Joseph Arvalo	4666	12	1,300.00
181	Alfred M. Conley	4666	12A	730.00
182	Jose Cesena	4666	12B	250.00
183	Shilling Est. Co.	4666	14	600.00
184	Nick Pork	4666	15,16B	875.00
185	August Pierez	4666	15A	200.00
186	John Rosado	4666	15B	225.00
187	Robert W. Chase	4666	16,16A	1,000.00
188	Thomas A. Ryan	4683	1,2	1,400.00
191	Gino L. Dentesano	4683	4,5,5A,5B	2,250.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
192	Raymond F. Gillette	4683	6,6A,6B	\$ 3,770.00
193	Joseph Valez Rafela Valez	4683	7	500.00
194	S. Rivera F. Rivera	4683	7A	1,600.00
195	J. Portelo	4683	8,8A	500.00
196	C. Burdick	4683	8B	2,550.00
197		4683	9	
198	C. F. McCann	4683	9A	2,180.00
199	Minnie Hildbrecht	4683	10,14	1,500.00
200	Katherina Stauffer	4683	11	600.00
201	Jochim Sass	4683	12	700.00
203	Houghton Company	4683	15	600.00
[64]				
204	Manuel Farrell	4683	16A	1,730.00
205	South San Francisco Dock Company	4684	1	3,900.00
207	William T. G. Jordan	4684	3	250.00
208	Marie S. Sigall Helen S. Smith	4684	4	500.00
209	Alice M. Begley	4684	5	625.00
210	Herbert C. Rodenberger	4684	6	625.00
211	Lily O'Connor, et al.	4694	1,2	1,380.00
212	Oscar Sarlin	4694	3	635.00
213	Katherina Stauffer	4694	4,5,6,7,8, 9,16	4,000.00
214	Mercantile Trust Co.	4694	10	3,750.00
215		4694	11,12,13, 14	
216	Dorothy Jones	4694	15	2,150.00
217		4694	15A	
218	Ray T. Burke	4694	15B	1,850.00
219	South San Francisco Dock Company	4590	Portion	6,250.00
220	South San Francisco Dock Company	4593		8,000.00
221	South San Francisco Dock Company	4610	1A	9,080.00



## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
222	South San Francisco Dock Company	4576-A		\$ 1.00
223	South San Francisco Dock Company	4591		11,500.00
224	South San Francisco Dock Company	4592	5	8,970.00
225	South San Francisco Dock Company	4663	Portion	5,341.00
226	South San Francisco Dock Company	4664		10,295.00
[65]				
227	South San Francisco Dock Company	4685		2,750.00
228	South San Francisco Dock Company	4686	Portion	785.00
229	South San Francisco Dock Company	4692	Portion	1,650.00
230	South San Francisco Dock Company	4693		4,145.00
231	South San Francisco Dock Company	4709		210.00
232	South San Francisco Dock Company	4710		4,958.00
233	South San Francisco Dock Company	4711		4,958.00
234	South San Francisco Dock Company	4712		2,795.00
235	South San Francisco Dock Company	4713	Portion	900.00
236	South San Francisco Dock Company	4720	Portion	150.00
237	South San Francisco Dock Company	4721		1,750.00
238	South San Francisco Dock Company	4722		2,750.00
239	South San Francisco Dock Company	4723		2,750.00
240	South San Francisco Dock Company	4724		4,958.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
241	South San Francisco Dock Company	4725		\$ 4,475.23
242	South San Francisco Dock Company	4612-A		185,000.00
243	Estate of James M. McDonald, c/o Mrs. Blythe McDonald Hayden, Los Angeles, Calif.	4567		2,000.00
				[66]
244	Flora Vandenberg Western Title Ins. Co., Muriel A. Branham, et al.	4575		2,500.00
245-A	Stuart Kepner	4576A	Portion	1,570.00
245-B	Harvey M. Toy	4576A	Portion	1,000.00
246	Muriel A. Branham, et al.	4590	Portion	250.00
247	Estate of James M. McDonald	4662		1,200.00
248	Peter Dean Company	4663	Portion	500.00
249	Betty J. Horn Hermanda Joost Lester L. Roth Rennee Bransten	4686	Portion	900.00
250	Henry Investment Co., c/o Thornwall Mullally, Crocker First National Bank Building	4687		1,200.00
251	Henry Investment Co.	4688		200.00
252	Henry Investment Co.	4689		500.00
253	Henry Investment Co.	4690		1,200.00
254	Muriel A. Branham, et al.	4691		1,200.00
255	Muriel Jacobs	4692	Portion	100.00
256	Wells Fargo Bank & Union Trust Company	4713	Portion	600.00
257	James Madison Estate Company Matilda T. Altvater Sarah Gleeson	4714		1,250.00

## Schedule "A"—(Continued)

Parcel Number	Owner	Block Number	Lot Number	Estimated Fair Compensation
258	Robert W. Kelly Winifred S. Kelly Elma D. Goodman Walter E. Dakin Elsa Everding	4715		\$ 1,250.00
259	James S. Hutchinson	4716		700.00
				[67]
260	C. A. Wellman	4717		1,000.00
261	John H. Stahl	4718		1,250.00
262	State of California Elizabeth Harms Johanna E. MacNicol Martha Chase Holland	4719		1.00
263	Albert Gallatin	Portion of 4720		130.00
264	Malvena Gallatin			
264	Frank A. Leach	Portion of 4720		600.00
265	Rosa Chaim, et al.	Portion of 4720		75.00
266	Nellie Barrett, et al	Portion of 4720		500.00
City of San Francisco, California				1.00
For any and all right, title and interest in and to the land described in the de- claration of taking and appurtenances belonging.				
Total.....				\$726,965.78

[Endorsed]: Filed Dec. 12, 1942. [68]

[Title of District Court and Cause.]

ANSWER OF FRANK M. WEBER

Now comes Frank M. Weber and answering the complaint on file herein admits, denies and alleges as follows:

I.

That Frank M. Weber is the owner in fee simple absolute and entitled to the possession of the lots shown on the plat attached to said complaint as Lot 9 in Block 4611 and Lot 11 in Block 4616.

II.

That the value of said lots is not known to this defendant but that this defendant is willing that the value thereof may be determined by the above entitled Court in this action, and consents to accept such value as may be so determined in condemnation, together with interest and his costs of suit.

[69]

Wherefore, said defendant prays that the value of his said lots be determined in the judgment of this Court, and that said value be paid to this defendant, together with interest and for his costs of suit.

FRANK M. WEBER

M. WEBER,

Attorney for defendant

Frank M. Weber [70]

State of California,  
City and County of San Francisco—ss.

Frank M. Weber, being duly sworn, deposes and says:—

That he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

FRANK M. WEBER

Subscribed and sworn to before me this 3rd day of August, 1942.

[Seal] CATHERINE E. KEITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Receipt of Service.

[Endorsed]: Filed Aug. 6, 1942. [71]



[Title of District Court and Cause.]

ANSWER OF DEFENDANTS EVA M. WELLS,  
OLGA K. NEWPORT, ERNEST H. KREY-  
ENHAGEN, JENNIE MAY MERRILL  
MILLER, SUED HEREIN AS JENNIE M.  
MERRILL AND AS JENNIE L. MERRILL,  
ALMA H. SILVA, LILLIAN ARNEY, SUED  
HEREIN AS LILLIAN HERRIFORD, AND  
LOWELL HERIFORD, SUED HEREIN AS  
LOWELL HERRIFORD, AND WALTER  
MERRILL

Come now the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva by Lillian Arney, her general guardian, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill, and answering the complaint in condemnation on file herein, allege:

I.

That said defendants, together with Paul Merrill, [72] were at the time of the filing of the said complaint, to-wit, April 4th, 1942, and at the time of the judgment on the declaration of taking filed April 22nd, 1942, the owners in fee simple and entitled to the possession of those certain parcels of land situate in the City and County of San Francisco, State of California, described as follows:

Parcel 1:

Commencing at a point on the northeasterly line

of Fairfax avenue, distant thereon 75 feet southeasterly from the southeasterly line of Boalt street; running thence southeasterly and along said line of Fairfax avenue 75 feet; thence at a right angle northeasterly 100 feet; thence at a right angle northwesterly 75 feet; thence at a right angle southwesterly 100 feet to the point of commencement.

Being part of Block No. 108, South San Francisco Homestead and Railroad Association.

Parcel 2:

Commencing at a point on the southwesterly line of Fairfax avenue distant thereon 25 feet southeasterly from the southeasterly line of Boalt street; running thence southeasterly and along said line of Fairfax avenue 87 feet 6 inches; thence at a right angle southwesterly 100 feet; thence at a right angle northwesterly 87 feet 6 inches; thence at a right angle northeasterly 100 feet to the point of commencement.

Being part of Block No. 111 South San Francisco Homestead and Railroad Association.

That the two parcels of real property hereinabove described are a part of the property described in the complaint in condemnation and in the judgment of declaration of taking, being referred to in said judgment of taking as Parcel 7 and Parcel 16; that Parcel 1 hereinabove described was at the time of the judgment of declaration of taking of a value of \$1250.00; that the second parcel herein-

above described was at the time of the judgment of declaration of taking of a value of \$1350.00.

## II.

That Eva M. Wells was at all times herein mentioned the owner of an undivided  $24/70$ th interest in and to said property [73] that Olga K. Newport and Ernest H. Kreyenhagen were at all times herein mentioned the owners of an undivided  $24/70$ ths interest in and to said property; that Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, was at all times herein mentioned the owner of an undivided  $4/70$ ths interest in and to said property; that Alma H. Silva was at all times herein mentioned the owner of an undivided  $1-1/3/70$ ths interest in and to said property; that Lillian Arney, sued herein as Lillian Herriford, was at all times herein mentioned the owner of an undivided  $1-1/3/70$ ths interest in and to said property; that Lowell Heriford, sued herein as Lowell Herriford, was at all times herein mentioned the owner of an undivided  $1-1/3/70$ ths interest in and to said property; that Walter Merrill was at all times herein mentioned the owner of an undivided  $4-1/3/70$ ths interest in and to said property; that Paul Merrill was at all times herein mentioned the owner of an undivided  $9-2/3/70$ ths interest in and to said property.

## III.

That Alma H. Silva is an incompetent person, and after proceedings duly and regularly had in the State of California, in and for the County of

San Benito, Lillian Arney was appointed guardian of her person and estate; that said Lillian Arney duly qualified as such guardian, and was at the time of the commencement of this action, and ever since has been the duly appointed and qualified guardian of the person and estate of Alma H. Silva.

#### IV.

That prior to the commencement of the above entitled action Maria M. Kreyenhagen, Ernest H. Kreyenhagen and Olga K. Newport were the owners of an undivided 24/70ths interest [74] as joint tenants; that Maria M. Kreyenhagen died in the County of ..... State of California, on the ..... day of ..... 19.. and that by reason of her death her interest therein terminated, and ever since the ..... day of 19.. Ernest H. Kreyenhagen and Olga K. Newport have been and were at the time of the judgment of declaration of taking entered in this action the owners in fee simple as joint tenants of an undivided 24/70ths interest in and to the real property hereinabove described.

#### V.

That these answering defendants and Paul Merrill are entitled to the full compensation in the proportions hereinabove set forth for the parcels of real property hereinabove described, by reason of the taking thereof by the plaintiff in this action.

Wherefore, these defendants pray that this Honorable Court do decree and determine:

1. That these answering defendants, together



with Paul Merrill, were at the time of the judgment of declaration of taking the owners in fee simple in the proportions set forth in this answer of the real property hereinabove described.

2. That these answering defendants and Paul Merrill are entitled to compensation for the taking of said real property by the plaintiff in the amount of \$2600.00, the value of said real property.

3. That this court make its decree directing the clerk of said court to pay to these answering defendants and Paul Merrill the proportionate share each is entitled to as compensation from the said sum of \$2600.00.

4. And for such other and further relief as may be meet and proper in the premises.

ROYAL E. HANDLOS,

Attorney for said Answering  
Defendants. [75]

State of California,

City and County of San Francisco.—ss.

Royal E. Handlos, being first duly sworn, deposes and says:

That he is the attorney for the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Heriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill; that all the said defendants are absent from the City and County of San Francisco where affiant has his office, and for



that reason affiant verifies the said answer; that affiant has read the said answer and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters that he believes it to be true.

**ROYAL E. HANDLOS.**

Subscribed and sworn to before me this 6th day of January, 1944.

[Seal]                      **JANE O'CONNOR,**

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 6, 1944. [76]

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[Title of District Court and Cause.]

**NOTICE OF MOTION FOR PAYMENT OF  
MONEY**

To the plaintiff above named and to M. Mitchell Bourquin, Esq., its attorney:

You and each of you will please take notice and you are hereby notified; that on Monday, the 29th day of November, 1943 at the hour of 10:00 o'clock A. M. of said day, in the Courtroom of the above entitled court in the Post Office Building, Seventh and Mission Streets, San Francisco, California, the defendant Frank M. Weber, will move the above entitled court the Honorable Michael J. Roche judge thereof, for its order directing the clerk of the above entitled court to pay to the defendant Frank

M. Weber on account of compensation the sum of \$1,950.00. Said sum being the amount on deposit in the above entitled court as and for compensation for the parcels of land described in the complaint on file herein as Lot 9 in Block 4611 and Lot 11 in Block 4616. [77]

Said motion will be made upon the ground that said defendant Frank M. Weber is the only person entitled to the entire compensation for said parcels of land.

Said motion will be based upon all of the records and files in the above entitled action, the Affidavit of Frank M. Weber served herewith and the Points and Authorities served herewith.

Dated: November 22, 1943.

**M. WEBER,**

Attorney for defendant Frank  
M. Weber. [78]

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[Title of District Court and Cause.]

**AFFIDAVIT OF FRANK M. WEBER IN SUP-  
PORT OF MOTION FOR PAYMENT OF  
MONEY**

State of California,

City and County of San Francisco.—ss.

Frank M. Weber, being first duly sworn deposes and says:

That he is one of the defendants in the above entitled action. That he is the defendant claiming

compensation for the lots or parcels of land described in the complaint on file herein as Lot 9 in Block 4611 and Lot 11 in Block 4616.

That general taxes for municipal and state purposes for the fiscal year 1936-1937 which were levied and assessed on the parcels of land hereinabove referred to, having become delinquent, said property was sold to the State of California on the 25th day of June, 1937 pursuant to Section 3771 of the [79] Political Code of the State of California. That thereafter, general taxes for the fiscal years 1937-1938, 1938-1939, 1939-1940 and 1941-1942 which were levied and assessed on said property having become delinquent, said property was sold at public auction by the State of California to this defendant on the 1st day of July, 1942 pursuant to the provisions of Section 3771a of the Political Code of the State of California. That on the 14th day of July, 1942, in accordance with the provisions of the Political Code and the Revenue and Taxation Code of the State of California, and after a sale of said property at public auction on the 1st day of July, 1942 as aforesaid, Edward F. Bryant as tax collector of the City and County of San Francisco, State of California, made, executed and delivered to this defendant two separate deeds to the property herein referred to. That said deeds to this defendant by said Edward F. Bryant as tax collector of the City and County of San Francisco, State of California as aforesaid, were thereafter and on the 21st day of July, 1942 duly and regularly recorded in the office

of the County Recorder of the City and County of San Francisco, State of California. That one of such deeds was recorded in Volume 3894 Official Records at page 384 thereof and the other of such deeds was recorded in Volume 3894 Official Records at page 385 thereof.

That none of the former owners of said real property prior to the sale thereof to affiant at tax sale as aforesaid have appeared in this cause claiming compensation for the property herein referred to.

That affiant is informed and believes that he is entitled to the full compensation for the real property herein referred to.

Wherefore, affiant prays the order of this court directing payment to affiant on account of compensation for [80] *for* said property in the sum of \$1,950.00, said sum being the amount on deposit in this court as compensation for said property.

FRANK M. WEBER.

Subscribed and sworn to before me this 22nd day of November, 1943.

[Seal] CATHERINE E. KEITH,  
Notary Public in and for the City and County of  
San Francisco, State of California. [81]

[Title of District Court and Cause.]

#### POINTS AND AUTHORITIES

Title 40, Section 258a of United States Code Annotated, provides in part as follows:

“Upon the application of the parties in interest,



the court may order the money deposited in court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding.”

See also the case of *U. S. vs. 3.08 acres of land in North River, Borough of Manhattan, City and State of New York*, 46 Fed. Supp. 64 where it is held that in the government’s condemnation proceeding, where the government acquires title to property immediately by filing its petition and depositing in court money estimated to be just compensation for land taken, the District Court may order that the money deposited, or any part thereof, be paid forthwith to the parties in interest for or on account of just compensation to be awarded in the proceeding. See also to the same effect: *U. S. vs. 17,800 acres of land*, 47 Fed. Supp. 267. [82]

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**This Defendant is Entitled to Entire Compensation  
for the Real Property**

**U. S. vs. Certain Lands in Town of Hempstead,  
129 Fed. (2d) 918  
Decided July 21, 1942**

**Circuit Court of Appeals**

This case holds that where the Federal Government acquired title in a condemnation proceeding after the land had been sold to the county for taxes but before the expiration of the period of redemption, and the original owners did not redeem, and



the tax deed was issued to the county, the county was entitled to the entire compensation award.

Respectfully submitted,

M. WEBER,

Attorney for defendant Frank  
M. Weber.

Received a copy of the foregoing "Notice of Motion for Payment of Money", "Affidavit of Frank M. Weber in Support of Motion for Payment of Money" and "Points and Authorities" this 22nd day of November, 1943.

M. MITCHELL BOURQUIN,

Attorney for plaintiff.

[Endorsed]: Filed Nov. 22, 1943. [83]

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR PAYMENT  
OF MONEY

The motion of Frank M. Weber, one of the defendants in the above entitled cause, for payment to him of the amount on deposit in this court as compensation for the property herein involved having been heretofore heard and submitted and being now fully considered, it is by the Court Ordered that said motion for payment of money be and the same is hereby Denied.

Dated: February 16th, 1944.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Feb. 17, 1944. [84]

[Title of District Court and Cause.]

Objections and Amendments on Behalf of Defendant Frank M. Weber to Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, Alma H. Silva, Lillian Arney, Lowell Heriford and Walter Merrill.

The defendant Frank M. Weber hereby objects to findings (a), (b), (c) and (d) as the same are set forth in the proposed Findings of Fact and Conclusions of Law submitted herein on behalf of the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, Alma H. Silva, Lillian Arney, Lowell Heriford and Walter Merrill, upon the following ground:

1. That said findings of fact are not supported by and are contrary to the evidence offered and received at the trial of this cause. [61]

The defendant Frank M. Weber hereby submits and proposes the following amendments to and additions to said proposed Findings of Fact and Conclusions of Law submitted on behalf of the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, Alma H. Silva, Lillian Arney, Lowell Heriford and Walter Merrill:

1. That the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, Alma H. Silva, Lillian Arney,

Lowell Heriford and Walter Merrill failed and neglected to pay the general taxes for municipal and state purposes for the fiscal year 1936-1937 which were levied and assessed against Lot 9 in Block 4611 and Lot 11 in Block 4616, as described in Schedule A of the judgment of declaration of taking filed April 22, 1942 and said taxes thereupon became delinquent and said property was sold to the State of California on the 25th day of June 1937 pursuant to Section 3771 of the Political Code of the State of California.

2. That general taxes for the fiscal years 1937-1938, 1938-1939, 1939-1940, 1940-1941 and 1941-1942 which were levied and assessed on said property likewise became delinquent and thereupon said property was sold at public auction to the defendant Frank M. Weber on the 1st day of July, 1942, pursuant to the provisions of Section 3771a of the Political Code of the State of California.

3. That at said sale, the defendant Frank M. Weber paid for Lot 9 in Block 4611 the sum of \$151.49 and for Lot 11 in Block 4616 the sum of \$167.76 or a total of \$319.25 for both parcels of land. That of said sum of \$319.25, the sum of \$242.46 was for delinquent taxes levied and assessed against said parcels of land. [62]

4. That on July 14, 1942 in accordance with the provisions of the Political Code and the Revenue and Taxation Code of the State of California, Edward F. Bryant as Tax Collector of the City and County of San Francisco, State of California

made, executed and delivered to the defendant Frank M. Weber two separate deeds to the property herein described.

5. That on July 21, 1942 said deeds were duly and regularly recorded in the Office of the County Recorder of the City and County of San Francisco, State of California.

Dated: June 23, 1945.

M. WEBER

Attorney for defendant  
Frank M. Weber

[Endorsed]: Filed June 25, 1945. [63]

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District Court of the United States, Northern  
District of California, Southern Division.

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 9th day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable Michael J. Roche,  
District Judge.

[Title of Cause.]

ORDER OVERRULING DEFENDANTS OBJECTIONS AND AMENDMENTS TO FINDINGS, ETC.

This case came on regularly this day for settlement of findings. After hearing Royal E. Handlos,



Esq. and M. Weber, Esq., for certain defendants, it is Ordered that defendant Weber's objections be overruled. [64]

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[Title of District Court and Cause.]

## DECISION

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on February 28th, 1945, before the above entitled court, sitting without a jury, upon the answer of the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill, and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill, and the answer of the defendant Frank M. Weber; the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill [65] appearing by Royal E. Handlos, Esq., their attorney, and the defendant Frank M. Weber appearing by M. Weber, Esq., his attorney, and the action proceeding to trial only as to the real property referred to in the amendment to judg-



ment of declaration of taking filed December 12th, 1942, as Parcel 7 and Parcel 16, and as to the rights of the respective parties to compensation for the taking of said property by the plaintiff in said action, and evidence both oral and documentary having been introduced on the part of the various defendants appearing, and the cause having been submitted to the court for decision, the court now makes its findings of fact and conclusions of law as follows:

### FINDINGS OF FACT

(a) That all of the allegations of paragraphs I, II, III, IV and V of the answer of the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill, are true.

(b) That the allegations of paragraphs I and II of the answer of Frank M. Weber are untrue.

(c) That the compensation for the taking of Lot No. 9 in Block 4611, and of Lot No. 11 in Block 4616, as described in Schedule A of judgment of declaration of taking filed April 22nd, 1942, and in Schedule A attached to the amendment to declaration of taking filed December 12th, 1942, as Parcels 7 and 16, places the value of the first parcel above described shown as Parcel 7 in

said Schedule A of amendment to declaration of taking at \$1250, and the second parcel above described shown as Parcel 16 in said Schedule A of amendment to declaration of taking at \$1350.

(b) That at the time of the judgment of declaration of taking filed April 22nd, 1942, and the amendment to [66] declaration of taking filed December 12th, 1942, said property was subject to taxes due, payable and delinquent in favor of the City and County of San Francisco, State of California, in the sum of \$242.46.

### CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact it follows:

#### I.

That the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lilian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, Walter Merrill and Paul Merrill are entitled to and are hereby awarded the said sum of \$2600.00, less the sum of \$242.46 due the City and County of San Francisco, State of California, for taxes due, payable and delinquent against the said property at the time of the said declaration of taking, in the following proportions:

That Eva M. Wells is entitled to 24/70ths of said sum.

That Olga K. Newport and Ernest H. Kreyenhagen are entitled to 24/70ths of said sum.

That Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, is entitled to 4/70ths of said sum.

That Alma H. Silva is entitled to 1-1/3/70ths of said sum.

That Lillian Arney, sued herein as Lillian Heriford is entitled to 1-1/3/70ths of said sum.

That Lowell Heriford, sued herein as Lowell Herriford, is entitled to 1-1/3/70ths of said sum.

That Walter Merrill is entitled to 4-1/3/70ths of said sum.

That Paul Merrill is entitled to 9-2/3/70ths of said sum. [67]

## II.

That defendant Frank W. Weber is not entitled to any sum of money as compensation by reason of the taking of said property by the plaintiff.

Let Judgment be entered accordingly.

Dated: July 9th, 1945.

MICHAEL J. ROCHE

Judge of said District Court.

[Endorsed]: Lodged July 3, 1945. Filed July 9, 1945. [68]

In the District Court of the United States in and  
for the Northern Division of California, South-  
ern Division.

No. 22147-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 acres of land in the City and County of San  
Francisco, State of California, CARRIE F.  
REDNALL, et al.,

Defendants.

### JUDGMENT

This cause came on regularly for trial on February 28th, 1945, before the above entitled court, sitting without a jury, upon the answer of the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill, and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill, and the answer of the defendant Frank M. Weber; the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, and Walter Merrill [69] appearing by Royal E. Handlos, Esq., their attorney, and the defendant Frank M. Weber appearing



by M. Weber, Esq., his attorney, and the action proceeding to trial only as to the real property referred to in the amendment to judgment of declaration of taking filed December 12th, 1942, as Parcel 7 and Parcel 16, and as to the rights of the respective parties to compensation for the taking of said property by the plaintiff in said action, and evidence both oral and documentary having been introduced on the part of the various defendants appearing, and the cause having been submitted to the court for decision, and findings of fact and conclusions of law having been filed herein,

It Is Ordered that the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, Walter Merrill and Paul Merrill are entitled to and are hereby awarded the said sum of \$2600.00, less the sum of \$242.46 due the City and County of San Francisco, State of California, for taxes due, payable and delinquent against the said property at the time of the said declaration of taking, in the following proportions:

That Eva M. Wells is entitled to 24/70ths of said sum.

That Olga K. Newport and Ernest H. Kreyenhagen are entitled to 24/70ths of said sum.

That Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, is entitled to 4/70ths of said sum.



That Alma H. Silva is entitled to 1-1/3/70ths of said sum.

That Lillian Arney, sued herein as Lillian Herri-ford is entitled to 1-1/3/70ths of said sum.

That Lowell Heriford, sued herein as Lowell Herriford, is entitled to 1-1/3/70ths of said sum.

That Walter Merrill is entitled to 4-1/3/70ths of said sum.

That Paul Merrill is entitled to 9-2/3/70ths of said sum. [70]

It Is Further Ordered that the defendant Frank M. Weber has no right, title or interest in or to the said funds or any part thereof, and is not entitled to any sum of money as compensation by reason of the taking of said property by the plaintiff.

Dated: July 10th, 1945.

MICHAEL J. ROCHE

Judge of said District Court

[Endorsed]: Filed July 10, 1945. [71]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL.

Notice is hereby given that the defendant Frank M. Weber hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled court awarding the sum of \$2,600.00 less the sum of

\$242.46 to the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Merrill and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford, and Lowell Heriford, sued herein as Lowell Herriford, Walter Merrill and Paul Merrill, as compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616 as described in the declaration of taking on file herein; and against said defendant Frank M. Weber declaring that said defendant Frank M. Weber has no right, title or interest in or to said funds or any part thereof and that he is not entitled to any sum of money as compensation by reason of the taking of [72] said property by plaintiff. Said judgment having been made and entered herein on the 10th day of July, 1945.

Dated: July 11, 1945.

M. WEBER

Attorney for defendant Frank  
M. Weber.

[Endorsed]: Filed July 11, 1945. [73]

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated by and between counsel for the respective parties hereto that the amount of the supersedeas bond in this cause shall be the

sum of \$2600.00. Said bond shall be a surety company bond.

Dated: July 11th, 1945.

ROYAL E. HANDLOS

Attorney for defendants Eva  
M. Wells, et. al.

M. WEBER

Attorney for defendant Frank  
M. Weber

[Endorsed]: Filed July 11, 1945. [74]

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[Title of District Court and Cause.]

#### UNDERTAKING ON APPEAL

Whereas, Frank M. Weber, one of the Defendants in the above-entitled action has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against him in said action, in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Plaintiff in said action, on the 10th day of July, 1945, for Two Thousand Six Hundred and No/100 (\$2,600.00) Dollars; and

Whereas, the appellant is desirous of staying the execution of the said judgment so appealed from,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned United Pacific Insurance Company, a corporation organized and existing under and by virtue of the laws of the

State of Washington, and authorized to transact a general surety business in the State of California, does hereby undertake and promise, on the part of the appellant, and does acknowledge itself justly bound in the sum of Two Thousand Six Hundred and No/100 (\$2,600.00) Dollars, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Circuit Court of Appeals for the Ninth Circuit in the Court from which the appeal is taken, judgment may be entered in said action on motion of respondent (and without notice to the undersigned surety) in its favor against the said surety, for such amount, together with interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

And further it is expressly understood that the United Pacific Insurance Company, as Surety hereunder, in case of a breach of any condition of this bond, agrees that the Court in the above entitled matter, may upon notice to it of not less than ten days, proceed summarily in the action, suit, case, or proceeding, in which the same is given to ascertain the amount which said surety is bound to pay

on account of such breach, and render judgment therefor against it, and award execution therefor. Signed and sealed this 12th day of July, 1945.

UNITED PACIFIC INSUR-  
ANCE COMPANY

By M. HENDERSON

Attorney-in-fact (M. Hender-  
son)

(Seal of United Pacific Insurance Company)

Approved

MICHAEL J. ROCHE

U. S. District Judge.

July 12, 1945.

The premium charge for this bond is \$52.00 per annum.

(Justification of Surety)

[Endorsed]: Filed July 12, 1945. [75]

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[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, in an action in the United States District Court for the Northern District of California, Southern Division, judgment was on July 10, 1945, given and entered in said Court, in favor of Plaintiff and against Defendants; and

Whereas, Frank M. Weber, one of the Defendants, is dissatisfied with said Judgment and is desirous of appealing therefrom to the United



States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, in consideration of the premises, and of such appeal, the United Pacific Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and authorized to transact a general surety business in the State of California, as Surety, does hereby undertake and promise on the part of the appellant, that said appellant will pay all costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

And further it is expressly understood that the United Pacific Insurance Company, as Surety hereunder, in case of a breach of any condition of this bond, agrees that the Court in the above entitled matter, may upon notice to it of not less than ten days, proceed summarily in the action, suit, case or proceeding, in which the same is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

In Witness Whereof, the said United Pacific Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-fact at

San Francisco, California, and its corporate seal to be hereto affixed, this 13th day of July, 1945.

UNITED PACIFIC INSUR-  
ANCE COMPANY

By M. HENDERSON

Attorney-in-fact (M. Hender-  
son)

(Seal of United Pacific Insurance Company)

The premium charge for this bond is \$5.00 per  
annum.

(Justification of Surety)

[Endorsed]: Filed July 13, 1945. [76]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL.

The appellant Frank M. Weber, makes the follow-  
ing statement of points on which appellant intends to  
rely upon the appeal herein:—

1. The District Court erred in awarding to the  
defendants Eva M. Wells, Olga K. Newport, Ernest  
H. Kreyenhagen, Jennie May Merrill Miller, sued  
herein as Jennie M. Merrill, and as Jennie L. Mer-  
rill, Alma H. Silva, Lillian Arney, sued herein as  
Lillian Herriford, and Lowell Heriford, sued herein  
as Lowell Herriford, and Walter Merrill and Paul  
Merrill the sum of \$2,600.00 less the sum of \$242.46

due the City and County of San Francisco, State of California, for taxes due, payable and delinquent against Lot 9 in Block 4611 and Lot 11 in Block 4616 as described in the declaration of taking on file herein. [77]

2. The District Court erred in holding that the defendant Frank M. Weber had no right, title or interest in or to said sum of \$2,600.00 or any part thereof, and is not entitled to any sum of money as compensation by reason of the taking of said property by plaintiff.

3. The District Court erred in holding that the defendant Paul Merrill was entitled to 9-2/3/70ths of said sum of \$2,600.00 or any part or portion thereof.

4. The District Court erred in holding the sum of \$242.46 was due the City and County of San Francisco, State of California.

5. The District Court erred in holding null and void the tax sale and tax deeds to appellant covering said parcels of land designated as Lot 9 in Block 4611 and Lot 11 in Block 4616 in the declaration of taking on file herein.

6. The District Court erred in holding that this condemnation action extended the statutory time for redemption by the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Miller, and as Jennie L. Merrill, Alma H. Silva, Lillian Arney, sued herein as Lillian Herriford,

and Lowell Heriford, sued herein as Lowell Heriford, Walter Merrill and Paul Merrill, beyond the five year period as provided by the law of the State of California.

M. WEBER

Attorney for Appellant Frank  
M. Weber

[Endorsed]: Filed July 23, 1945. [78]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET.

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 29, 1945 to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Aug. 20, 1945. [79]

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[Title of District Court and Cause.]

DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL.

To the Clerk of the above entitled court:—

The defendant Frank M. Weber, by his undersigned attorney, hereby designates for inclusion in the transcript of record on appeal the following pleadings, records, affidavits, proceedings and evi-

dence with reference to Lot 9 in Block 4616 as described in the declaration of taking on file herein:—

1. Complaint in condemnation.
2. Order Granting Immediate Possession and Use of Property Sought to Be Condemned.
3. Declaration of Taking.
4. Judgment filed herein April 22, 1942.
5. Amendment to Declaration of Taking.
6. Answer of defendant Frank M. Weber filed herein August 6, 1942.
7. Answer of defendants Eva M. Wells, et al., filed herein January 6, 1944.
8. Notice of Motion for Payment on Money, together with Affidavit of Frank M. Weber in support of Motion for Payment of Money and Points and Authorities, filed herein November 22, 1943.
9. Order Denying Motion for Payment of Money filed herein February 17, 1944.
10. All of the evidence offered and received at the trial of this cause had on February 28, 1945 including exhibits.
11. Decision, Findings of Fact and Conclusions of Law filed herein July 9, 1945.
12. Objections and Amendments on Behalf of Defendant Frank M. Weber to Findings of Fact and Conclusions of Law, filed herein June 25, 1945.



13. Order Overruling defendant Frank M. Weber's Objections and Amendments to Findings of Fact and Conclusions of Law.

14. Judgment filed herein July 10, 1945.

15. Notice of Appeal filed herein July 11, 1945.

16. Stipulation Covering amount of Supersedeas Bond filed herein July 11, 1945.

17. Supersedeas Bond filed herein July 12, 1945.

18. Cost Bond on Appeal filed herein July 13, 1945.

19. Statement of Points Upon Which Appellant Intends to Rely on Appeal, filed herein July 23, 1945.

20. This designation of Matter to Be Included in Record on Appeal.

M. WEBER

Attorney for Appellant Frank  
M. Weber.

[Endorsed]: Filed Aug. 30, 1945. [81]

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[Title of District Court and Cause.]

ORDER STAYING PROCEEDINGS PENDING  
APPEAL

The motion of the defendant Frank M. Weber for an order of this court staying proceedings herein pending his appeal to the United States Circuit

Court of Appeals, for the Ninth Circuit from the judgment of this court made and entered herein on the 10th day of July, 1945 awarding the sum of \$2,600.00 less the sum of \$242.46 to the defendants Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, sued herein as Jennie M. Miller and as Jennie L. Miller, Alma H. Silva, Lillian Arney, sued herein as Lillian Herri-ford, and Lowell Heriford sued herein as Lowell Herriford, Walter Merrill and Paul Merrill, as compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616 as described in the declaration of taking on file herein, having coming on regularly for hearing the 24th day of September, 1945.

And the Court being fully advised, [82]

Now Therefore, it is hereby ordered that said motion of said defendant Frank M. Weber be and the same is hereby granted and,

It Is Hereby Further Ordered that the operation of said judgment hereinabove described and all other and further proceedings, to the extent that the same affects said Lot 9 in Block 4611 and Lot 11 in Block 4616 above described or the money on deposit in this court as compensation for said parcels of land, be and the same are hereby stayed pending the decision of the said United States Circuit Court of Appeals, for the Ninth Circuit, and until such decision becomes final.

Done in open court this 27th day of September, 1945.

MICHAEL J. ROCHE

Judge of the District Court.

Received a copy of the above this 27th day of September, 1945.

ROYAL E. HANDLOS

Attorney for defendants Eva  
M. Wells, et. al.

[Endorsed]: Filed Sept. 27, 1945. [83]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET.

Good cause appearing therefor,

It is hereby Ordered that the Appellant herein may have to and including the 9th day of October, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 29, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Sept. 29, 1945. [84]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 84 pages, numbered from 1 to 84, inclusive, together with One (1) Volume of Reporter's Transcript for February 28, 1945, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, Plaintiff, vs. 230.5 acres of land in the City and County of San Francisco, et al., Defendants No. 22147 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.25 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of October, A. D. 1945.

[Seal]

C. W. CALBREATH,  
Clerk

By E. VAN BUREN  
Deputy Clerk [85]

In the Southern Division of the United States  
District Court, In and For the Northern Dis-  
trict of California

Before: Hon. Michael J. Roche, Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

230.5 ACRES OF LAND IN THE CITY AND  
COUNTY OF SAN FRANCISCO, STATE  
OF CALIFORNIA, and CARRIE R. RED-  
NALL, et al.,

Defendants.

Wednesday, February 28, 1945

Counsel Appearing:

For Frank M. Weber,

M. Weber, Esq.

For Eva M. Wells, Olga K. Newport, Ernest H.  
Kreyenhagen, Jennie May Merrill Miller, Alma  
H. Silva, Lillian Arney, Lowell Heriford, and  
Walter Merrill,

Royal E. Handlos, Esq.

Mr. Handlos: We have agreed to stipulate to certain facts subject to objections on both sides. In other words, Mr. Weber wants to object to the offer of my evidence, but he is stipulating to what the facts are; that is, that the people whom I represent were the owners at the time of the filing of the suit and declaration of taking. He will further stipulate that the judgment and declaration of taking was



recorded on April 29, 1942, in the office of the Recorder of the City and County of San Francisco. I think that is the evidence so far as our side of the case is concerned.

Mr. Weber: That may be so stipulated. I believe it is also clear in the record that Mr. Handlos represents a value of  $61\frac{1}{3}/70$ ths interest.

Mr. Handlos: I would like to specify the various interests of the people I represent. I will also put in the record the deed of the other owner at that time whom I do not represent. We have never been able to locate the other one. In other words, I do not represent Paul Merrill. The other people I represent and the interest are as follows: Eva M. Wells,  $24/70$ ths, Olga K. Newport and Ernest H. Kreyenhagen together own  $24/70$ ths interest. Jennie May Merrill Miller owns  $4/70$ ths interest, Alma H. Silva owns  $1\frac{1}{3}/70$ ths, Lillian Arney owns  $1\frac{1}{3}/70$ ths, Lowell Heriford owns  $1\frac{1}{3}/70$ ths, and Walter Merrill  $4\frac{1}{3}/70$ ths.

Mr. Weber: That may be so stipulated, subject to my objection that it is immaterial, irrelevant and incompetent.

Mr. Handlos: Mr. Weber wants to make an objection as to my offer as to the competency of it, and I want to make the same objection to his offer.

Mr. Weber: It is objected to as being immaterial, irrelevant and incompetent.

Mr. Weber: Will it be stipulated, Mr. Handlos, that Lot 9 in Block 4611 was sold to the defendant, Frank M. Weber, on the 1st day of July, 1942?

Mr. Handlos: As evidenced by this deed?

Mr. Weber: No, that is not evidenced by the

deed. That is the date of the sale. The deed is dated the 14th of July, 1942; and that that parcel of land was sold to the defendant Frank M. Weber for the sum of \$55, which was the amount that he bid at that sale; that thereafter and on the 14th of July, 1942, a deed was issued covering that property, and that thereafter, on the 21st of July, 1942, that deed was recorded in the office of the Recorder of the City and County of San Francisco in Volume 3894 of the Official Records, at page 384. And will it also be stipulated that the defendant Frank M. Weber purchased at a tax sale held in the City and County of San Francisco on the 1st day of July, 1942, the lot of land known as Lot 11, Block 4616, for the sum of \$56; that thereafter a tax deed was delivered to Frank M. Weber by the tax collector of the City and County of San Francisco covering said parcel of property. That said Frank M. Weber purchased said property for the sum of \$56, and thereupon the deed covering said property was recorded in the office of the Recorder of the City and County of San Francisco on the 21st of July, 1942, in Volume 3894, Official Records, page 385. I would like to offer those deeds in evidence subject to the objections that was made.

The Court: They may be admitted subject to a motion to strike and over the objection.

Mr. Weber: Will it also be stipulated that Lot 9 in Block 4611 was first sold to the State of California on the 25th of June, 1937, for delinquent taxes for 1936, both installments, for the sum of \$15.90, and will it also be stipulated that thereafter the defendant Frank M. Weber redeemed said prop-

erty on the 21st of July, 1942, and paid therefor the sum of \$96.49, as shown by these certificates? Also with respect to Lot 11 in Block 4616 said property was first sold to the State of California on the 25th of June, 1937, for delinquent taxes for the year 1936, both installments, for the sum of \$18.31, and that thereafter on the 21st of July, 1942, the defendant Frank M. Weber paid by way of redemption the sum of \$111.76?

Mr. Handlos: Yes.

Mr. Weber: I would like to offer those two certificates of redemption in evidence, subject to the same objection.

The Court: They may be admitted and marked.

Mr. Handlos: You will stipulate that your client paid more than the amount of taxes due on these two properties?

Mr. Weber: I can give you the exact amount. In other words, Lot 9, Block 4611 was sold to the State of California for the sum of \$15.90 on the 25th of June, 1937. The sum of \$15.90 was included in the sum of \$55, which he paid.

Mr. Handlos: He paid \$39.10 more than the taxes which were due against the property.

Mr. Weber: The difference between the two figures. Likewise as to Lot 11 he paid \$56 at the sale and it was sold to the State for the sum of \$18.31, and it is the difference between those two figures.

With that evidence we rest.

(Thereupon the case was submitted upon briefs to be filed 5 and 5.)

[Endorsed]: Filed Aug. 30, 1945.

## DEFENDANTS' EXHIBIT No. 1

This Indenture, made the 14th day of July, 1942, between Edward F. Bryant, Tax Collector of the City and County of San Francisco, State of California, first party, and Frank M. Weber, second party, witnesseth:

That whereas, the real property hereinafter described was duly assessed for taxation in the year 1936, to W. P., J. M. & J. L. Merrill; E. H. & M. M. Kreyenhagen; A. H. Silva; L. & L. Herriford; O. K. Newport & E. M. Wells, and was thereafter on the 25th day of June, 1937, by operation of law, duly sold to the State of California, by Edward F. Bryant, Tax Collector of said City and County of San Francisco, for non-payment of delinquent taxes which had been legally levied in said year 1936, and

Whereas, in conformity with law, the real property hereinafter described was thereafter on the 1st day of July, 1942, duly sold to Frank M. Weber, said second party, for the sum of Fifty-six Dollars, by Edward F. Bryant, Tax Collector of said City and County of San Francisco, for non-payment of delinquent taxes which were a lien on said real property, and

Whereas, all taxes levied and assessed against said property prior to the year 1942 have been paid and discharged, and that the property has been redeemed;

Now, therefore, the said first party in consideration of the premises, and in pursuance of the law in such case made and provided, does hereby grant to the said second party that certain real property



in the City and County of San Francisco, State of California, more particularly described as follows, to wit:

The lot of land numbered 11 in block numbered 4616 as delineated and designed in Assessor's Map Book filed on November 30th, 1936, in the office of the Recorder of the City and County of San Francisco, State of California.

The lot of land numbered 11 in block numbered 4616:

"That whereas the real property hereinafter described was duly assessed for taxation in the year 1936 to Walter Merrill, Paul Merrill, Ernest H. Kreyenhagen, Maria M. Kreyenhagen, Alma H. Silva, Lowell Herriford, Lillian Herriford, Olga K. Newport, Eva M. Wells, Jennie M. Merrill, Jennie L. Merrill, Tr. and was thereafter on the 25th day of June, 1937, by operation of law, duly sold to the State of California, by Edward F. Bryant, Tax Collector, . . . "

In Witness Whereof said first party has hereunto set his hand the day and years first above written.

EDWARD F. BRYANT

Tax Collector of the City and  
County of San Francisco.

State of California,

City and County of San Francisco—ss.

On this 14th day of July, A. D. 1942, before me, H. A. van der Zee, County Clerk and ex-officio Clerk of the Superior Court of the City and County of



San Francisco, State of California, personally appeared the within named Edward F. Bryant, personally known to me to be the Tax Collector of said City and County of San Francisco, whose name is subscribed to the annexed instrument as a party thereto, and personally known to me to be the individual described in and who executed the foregoing instrument and subscribed his name thereto as Tax Collector, and he duly acknowledged to me that he executed the same freely and voluntarily and as such Tax Collector, for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as County Clerk and ex-Officio Clerk of the Superior Court, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

H. A. VAN DER ZEE

County Clerk and ex-Officio  
Clerk of the Superior Court

By ROBERT MUNSON

Chief Clerk.

Recorded at Request of Grantee at 10 Min. Past 1 P.M., July 21, 1942. 3894. Official Records, p 385. City and County of San Francisco, California. Thos. A. Toomey, Recorder.

[Endorsed]: Filed 2-28-45.

## DEFENDANTS' EXHIBIT No. 2

This Indenture, made the 14th day of July, 1942, between Edward F. Bryant, Tax Collector of the City and County of San Francisco, State of California, first party, and Frank M. Weber, second party, witnesseth:

That whereas, the real property hereinafter described was duly assessed for taxation in the year 1936 to W. P., J. M. & J. L. Merrill; E. H. and M. M. Kreyenhagen; A. H. Silva; L. & L. Herri-ford; O. K. Newport & E. M. Wells, and was there-after on the 25th day of June, 1937, by operation of law, duly sold to the State of California, by Edward F. Bryant, Tax Collector of said City and County of San Francisco, for non-payment of delinquent taxes which had been legally levied in said year 1936, and

Whereas, in conformity with law, the real property hereinafter described was thereafter on the 1st day of July, 1942, duly sold to Frank M. Weber, said second party, for the sum of Fifty-five Dollars, by Edward F. Bryant, Tax Collector of said City and County of San Francisco, for non-payment of delinquent taxes which were a lien on said real property, and

Whereas, all taxes levied and assessed against said property prior to the year 1942 have been paid and discharged, and that the property has been re-deemed;

Now, therefore, the said first party in consideration of the premises, and in pursuance of the law in such case made and provided, does hereby grant

to the said second party that certain real property in the City and County of San Francisco, State of California, more particularly described as follows, to wit:

The lot of land numbered 9 in block numbered 4611 as delineated and designated in Assessor's Map Book filed on November 30th, 1936, in the office of the Recorder of the City and County of San Francisco, State of California.

The lot of land numbered 11 in block numbered 4616:

“That whereas the real property hereinafter described was duly assessed for taxation in the year 1936 to Walter Merrill, Paul Merrill, Ernest H. Kreyenhagen, Maria M. Kreyenhagen, Alma H. Silva, Lowell Herriford, Lillian Herriford, Olga K. Newport, Eva M. Wells, Jennie M. Merrill, Jennie L. Merrill, Tr. and was thereafter on the 25th day of June, 1937, by operation of law, duly sold to the State of California, by Edward F. Bryant, Tax Collector, . . . ”

In Witness Whereof said first party has hereunto set his hand the day and years first above written.

EDWARD F. BRYANT

Tax Collector of the City and  
County of San Francisco.

State of California,  
City and County of San Francisco—ss.

On this 14th day of July, A. D. 1942, before me,  
H. A. van der Zee, County Clerk and ex-officio Clerk

of the Superior Court of the City and County of San Francisco, State of California, personally appeared the within named Edward F. Bryant, personally known to me to be the Tax Collector of said City and County of San Francisco, whose name is subscribed to the annexed instrument as a party thereto, and personally known to me to be the individual described in and who executed the foregoing instrument and subscribed his name thereto as Tax Collector, and he duly acknowledged to me that he executed the same freely and voluntarily and as such Tax Collector, for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal as County Clerk and ex-Officio Clerk of the Superior Court, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

H. A. VAN DER ZEE

County Clerk and ex-Officio  
Clerk of the Superior Court

By ROBERT MUNSON  
Chief Clerk

Recorded at Request of Grantee at 9 Min. Past  
1 P. July 21, 1942. 3894. Official Record, p 384.  
City and County of San Francisco, California.  
Thos. A. Toomey, Recorder.

[Endorsed]: Filed 2-28-45.



## DEFENDANT'S EXHIBIT No. 3

City and County of San Francisco

## CERTIFICATE OF REDEMPTION

(For Real Estate Sold at Auction)

Of real estate sold to the state on the 25 day of June, 1937, for delinquent taxes of 1936, both installment and redeemed July 21, 1942, in accordance with Political Code, Section 3817. Assessed to Walter Merrill.

Vol. 28

Block 4616

Lot 11

Sale No. 2151

Assessed Value

At Year of Sale \$440

City and County of San  
Francisco,

Office of the Treasurer

Received of Redemptioner:

Frank M. Weber

4867 Mission

\$111.76

A check, draft or money order proffered in settlement of this obligation shall not constitute payment until duly honored and collected.

Witness My Hand

Date July 21, 1942

[Stamped] Received for Collection Check, Draft or Money Order, July 21, 1942. Duncan Matheson, Treasurer. By: W. E. Logan, Deputy.

Delinquent City and

County Taxes 1936....\$16.64

Penalties for

Delinquencies ..... 1.17

Costs ..... .50

Sold to the State for..... 18.31

Paid by the Redemptioner to Tax Collector July 1, 1942, under the provisions of Sec. 3476, Rev. & Tax Code.

36½%	Penalty on Redemption .....	\$ 6.07
1937	Taxes .....	17.04
30½%	Penalty on Redemption.....	5.20
1938	Taxes .....	17.78
24½%	Penalty on Redemption.....	4.36
1939	Taxes .....	17.32
18½%	Penalty on Redemption.....	3.20
1940	Taxes .....	18.90
12½%	Penalty on Redemption.....	2.36
1941	Taxes .....	19.34
1%	Penalty on Redemption.....	.19

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Total Amount Necessary to Redeem.....\$111.76



State of California,  
City and County of San Francisco } I, Harold J. Boyd, Con-  
troller in and for said City and County, State aforesaid, do  
hereby certify that the foregoing statement contains a full and  
correct estimate of the amount necessary to redeem the within  
described real estate, made in accordance with the provisions of  
Section 3817, Political Code.

Witness my hand affixed at San Francisco.

HAROLD J. BOYD, Controller.

By E. RUTLEDGE.

Date July 21, 1942.

[Endorsed]: Filed 2-28-45.

## DEFENDANT'S EXHIBIT No. 4

City and County of San Francisco

### CERTIFICATE OF REDEMPTION

(For Real Estate Sold at Auction)

Of real estate sold to the state on the 25 day of June, 1937,  
for delinquent taxes of 1936, both installment and redeemed  
July 21, 1942, in accordance with Political Code, Section 3817.  
Assessed to Walter Merrill, et al.

Vol. 28

Block 4611

Lot 9

Sale No. 2148

Assessed Value

At Year of Sale \$380

City and County of San  
Francisco

Office of the Treasurer

Received of Redemptioner:

Frank M. Weber

4867 Mission

\$96.49

A check, draft or money order  
proffered in settlement of this  
obligation shall not constitute  
payment until duly honored and  
collected.

Witness my Hand

Date July 21, 1942

[Stamped] Received for col-  
lection, check, draft or money  
order, July 21, 1942. Duncan  
Matheson, Treasurer. By W. E.  
Logan, Deputy.

Delinquent City and

County Taxes 1936....\$14.38

Penalties for

Delinquencies ..... 1.02

Costs ..... .50

Sold to the State for..... 15.90

Paid by the Redemptioner to

Tax Collector July 1, 1942,

Under the Provisions of Sec.

3476, Rev. & Tax Code.

361½%	Penalty on Redemption.....	\$ 5.25
1937	Taxes .....	14.70
301½%	Penalty on Redemption.....	4.48
1938	Taxes .....	15.34
241½%	Penalty on Redemption.....	3.76
1939	Taxes .....	14.96
181½%	Penalty on Redemption.....	2.77
1940	Taxes .....	16.32
121½%	Penalty on Redemption.....	2.04
1941	Taxes .....	16.70
1%	Penalty on Redemption.....	.17

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Total Amount Necessary to Redeem.....\$ 96.49

State of California,  
City and County of San Francisco } I, Harold J. Boyd, Con-  
troller in and for said City and County, State aforesaid, do  
hereby certify that the foregoing statement contains a full and  
correct estimate of the amount necessary to redeem the within  
described real estate, made in accordance with the provisions of  
Section 3817, Political Code.

Witness my hand affixed at San Francisco.

HAROLD J. BOYD, Controller.

By E. RUTLEDGE.

Date July 21, 1942.

[Endorsed]: Filed 2-28-45.

[Endorsed]: No. 11154. United States Circuit Court of Appeals for the Ninth Circuit. Frank M. Weber, Appellant, vs. Eva M. Wells, Olga K. Newport, Ernest H. Kreyenhagen, Jennie May Merrill Miller, Alma H. Silva, Lillian Arney, Lowell Heriford, Walter Merrill and Paul Merrill, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 9, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals,  
for the Ninth Circuit

No. 11154

FRANK M. WEBER,

Appellant,

vs.

EVA M. WELLS, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD TO BE  
PRINTED

Appellant hereby adopts as his statement of points on appeal the statement of points appearing in the transcript of record on file herein.

The clerk of the above entitled court is hereby requested and instructed to print the record in its entirety as certified and that all exhibits transmitted to said clerk shall be reproduced and printed as part of the record herein.

Dated: October 22, 1945.

M. WEBER

Attorney for Appellant

Frank M. Weber

Received a copy of the above this 23 day of October, 1945.

J. B. CHUBBUCK

Attorney for Appellees Eva

M. Wells, et al.

[Endorsed]: Filed October 23, 1945. Paul P. O'Brien, Clerk.

No. 11,154

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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FRANK M. WEBER,

*Appellant,*

VS.

EVA M. WELLS, OGLA K. NEWPORT, ERNEST  
H. KREYENHAGEN, JENNIE MAY MERRILL  
MILLER, ALMA H. SILVA, LILLIAN ARNEY,  
LOWELL HERIFORD, WALTER MERRILL and  
PAUL MERRILL,

*Appellees.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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MATHEW WEBER,

3227 21st Street, San Francisco 10,

*Attorney for Appellant.*

FILED

JAN 21 1946

PAUL P. O'BRIEN,  
CLERK





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No. 11,154

IN THE  
**United States Circuit Court of Appeals**  
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FRANK M. WEBER,

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MILLER, ALMA H. SILVA, LILLIAN ARNEY,  
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*Appellees.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

**APPELLANT'S OPENING BRIEF.**

---

**OPINION.**

The District Court did not write an opinion. No legal or other reason was given by the District Court in support of its judgment.

### **JURISDICTION.**

This is an appeal from the judgment of the District Court awarding to appellees the sum of \$2600.00 less the sum of \$242.46 as compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616, and against appellant declaring that he has no right, title or interest in or to said funds or any part thereof and that he is not entitled to any sum of money by reason of the taking of said property. (R. 68-70.) Notice of appeal was filed July 11, 1945. (R. 70-71.) The jurisdiction of the District Court was invoked under the Act of Congress approved July 19, 1940 (Public Law No. 757, 76th Congress, 3rd Session) and the Second War Powers Act of 1942 (S. 2208, 77th Congress, 2nd Session). (R. 8.) The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

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### **QUESTION PRESENTED.**

The sole question involved in this appeal is, who is entitled to the compensation for Lot 9 in Block 4611 and Lot 11 in Block 4616; the appellant as purchaser at a tax sale, who acquired the tax deed after title to the property vested in the United States by condemnation or appellees as the former owners of the property.



**STATEMENT OF FACTS.**

This condemnation proceeding was commenced on April 4, 1942 by filing of the Government's complaint to condemn 230.5 acres of land at the Naval Dry Dock, Hunter's Point, San Francisco, California. (R. 1-15.) An order of immediate possession was obtained on the same day. (R. 15-18.) A declaration of taking was signed on April 15, 1942, pursuant to the Act of February 26, 1931, C. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a. (R. 19-31.) On April 22, 1942, an *ex parte* judgment was entered declaring that the United States was entitled to acquire the property for the purposes stated and ordering immediate delivery of possession. (R. 32-36.) Thereafter, on August 6, 1942, appellant filed his answer herein. (R. 48-49.) On December 12, 1942, an amended declaration of taking was filed. (R. 37-47.) On November 22, 1943 appellant filed his notice of motion for payment to him on account of compensation the sum of \$1950.00, being the amount then on deposit in the District Court as compensation for the parcels of land described as Lot 9 in Block 4611 and Lot 11 in Block 4616. At the same time, appellant filed his affidavit in support of such motion and also his points and authorities in support of such motion. (R. 55-60.) On January 6, 1944, appellees filed their answer herein. (R. 50-55.) On February 7, 1944, Honorable Michael J. Roche filed herein his formal order denying appellant's motion for payment to him of said money. (R. 60.)

From the uncontradicted affidavit of appellant in support of his said motion (R. 56-58) and from the

evidence offered and received at the trial of this cause on February 28, 1945 (R. 84-96), it appears that the appellees having failed and neglected to pay the general taxes for municipal and state purposes for the year 1936, which were levied and assessed on said parcels of land herein referred to, and said taxes having become delinquent, said property was sold to the State of California on the 25th day of June, 1937, pursuant to Section 3771 of the Political Code of the State of California. That thereafter, general taxes for the years 1937, 1938, 1939, 1940 and 1941 which were levied and assessed on said property having likewise become delinquent, said property was sold at public auction to this appellant on the 1st day of July, 1942, pursuant to the provisions of Section 3771a of the Political Code of the State of California. That on July 14, 1942, in accordance with the provisions of the Political Code and Revenue and Taxation Code of the State of California, Edward F. Bryant as Tax Collector of the City and County of San Francisco, State of California, made, executed and delivered to appellant two separate deeds to the property herein referred to. That on July 21, 1942, said deeds were duly and regularly recorded in the office of the Recorder of the City and County of San Francisco, State of California. (R. 88-93.) That on said 21st day of July, 1942, appellant paid to the City and County of San Francisco all delinquent taxes which were levied and assessed on said property for the years 1937, 1938, 1939, 1940 and 1941. (R. 94-96.)

**SPECIFICATIONS OF ERRORS.**

The District Court erred (R. 76-78):

1. In awarding to appellees the sum of \$2600.00 less the sum of \$242.46 due the City and County of San Francisco, State of California for taxes due, payable and delinquent against Lot 9 in Block 4611 and Lot 11 in Block 4616 as described in the declaration of taking on file herein.

2. In holding that appellant had no right, title or interest in or to said sum of \$2600.00 or any part thereof, and is not entitled to any sum of money as compensation by reason of the taking of said property by the Government.

3. In holding that the defendant Paul Merrill was entitled to 9-2/3/70th of said sum of \$2600.00 or any part or portion thereof.

4. In holding that the sum of \$242.46 was due the City and County of San Francisco, State of California.

5. In holding null and void the tax sale and tax deeds to appellant covering said parcels of land designated as Lot 9 in Block 4611 and Lot 11 in Block 4616 in the declaration of taking on file herein.

6. In holding that this condemnation action extended the statutory time for redemption by appellees beyond the five year period as provided by the law of the State of California.

## INTRODUCTION.

Before entering upon a discussion and analysis of the law applicable to this case, we believe a brief resumé of the California law pertaining to the sale of real property for delinquent taxes is appropriate.

When taxes upon real property first become delinquent, the property owner is notified thereof by registered mail at his last known address as appearing on the assessment roll. The list of all tax-delinquent property in the county in which such real property is situate is then published in a newspaper of general circulation printed and published in such county. Such list also contains a notice setting forth a date, hour and place when and where such tax-delinquent property will be sold to the State of California for such delinquency. Thereupon and on the date set for said sale all tax-delinquent property not theretofore redeemed, is sold to the State of California pursuant to Section 3771 of the Political Code of the State of California. Thereafter, the property owner has five years to redeem from such sale. In the event the property owner fails to redeem during said five-year period, the property is then sold and deeded to a purchaser pursuant to Section 3771a of the Political Code of the State of California. In the case at bar, it was after the appellees Eva M. Wells, et al., had failed to redeem for a period of five years, that the property was sold to this appellant by the State of California pursuant to the provisions of said Section 3771a of the Political Code.



Section 3771 of the Political Code provides in part as follows:

“On the day and hour fixed for the sale in the delinquent tax list, all property upon which the taxes and assessments of all kinds, penalties and interest have not been fully paid, \* \* \* shall by operation of law and the declaration of the tax collector, be sold to the State, and said tax collector shall make in appropriate columns on the delinquent list, ‘Sold To The State’ \* \* \*.”

Section 3771a of the Political Code provides in part as follows:

“On the day and hour fixed for the sale in accordance with subdivision 2 of Section 3764 of this code, all property which has not been redeemed from the sale to the state or the sale thereof cancelled, *shall be sold by the tax collector at public auction to the highest bidder for cash in lawful money of the United States* \* \* \*.

*After such bid has been made and accepted, the right of redemption shall cease* \* \* \*”

---

### ARGUMENT.

**THE LIEN FOR THE GENERAL TAXES LEVIED AND ASSESSED AGAINST SAID PROPERTY FOR THE FULL FIVE YEAR PERIOD WAS A GOOD AND VALID LIEN.**

The property was first sold to the State of California on June 25, 1937, pursuant to Section 3771 of the Political Code above quoted, for delinquent taxes for the year 1936. Thereafter, appellees had five years to redeem from said sale, as provided by Section



3771a of said Political Code. Appellees also failed and neglected to pay the general taxes levied and assessed against said property for all years after 1936, to and including the year 1941. The taxes for each year after 1936 became a lien on the property on the first Monday in March of such year and the taxes for the last year of 1941 became a lien on the property on the first Monday in March, 1942, and prior to the commencement of this condemnation action on April 4, 1942. Therefore, the delinquent taxes for the full five-year period and for which the property was sold to appellant, were levied, assessed and liened on said property while title thereto was in appellees and prior to the time title thereto vested in the Government by reason of this condemnation action.

As to when general taxes become a lien upon real property, see Section 3718 of the Political Code of the State of California, which provides in part as follows:

“Every tax due upon real property is a lien against the property assessed; and every tax upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements; \* \* \* *which several liens attach as of the first Monday in March of each year.*”

See also, Section 2192 of the Revenue and Taxation Code of the State of California, which provides as follows:

“*All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.*”

See also the case of *City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710, which was an action brought by the City of Santa Monica to recover taxes paid under protest. The property assessed was privately owned on March 1, 1903. Thereafter, but before such assessment was levied, the City of Santa Monica acquired said property. The Court held with the defendant in said action that the lien of said taxes attached on the first Monday of March of said year and that

“The plaintiff, when it acquired this land, took it subject to the lien for county taxes to the same extent as would a private individual.”

See also the case of *United States v. Certain Parcels of Land in the City of San Diego*, 44 Federal Supplement 936, decided May 15, 1942, at page 939, where the Court said:

“The tax lien having attached to the property on the first day of March, 1941, is a fixed liability as of the first Monday of March, 1941, and attaches as a lien, and this lien is transferred to the award, and must be deducted from the awards to the several parcels.”

---

**THIS CONDEMNATION ACTION DID NOT EXTEND THE STATUTORY TIME FOR REDEMPTION BY APPELLEES BEYOND THE FIVE-YEAR PERIOD AS PROVIDED BY THE LAW OF THE STATE OF CALIFORNIA.**

It is clear that appellant is the owner of the property and consequently of the award unless the sale to him has been redeemed both as a matter of fact,

or as a matter of law. Admittedly, no redemption has been made or attempted in fact pursuant to the statute. Can the condemnation be considered as a redemption in law on the supposition that the award would very likely be greater than the amount required for redemption? On principle, it would seem that there would be no redemption because that right is a statutory privilege and must be exercised strictly in accordance with statute.

The right of redemption is strictly statutory and is subject to all the limitations and conditions therein imposed.

*Cooley on Taxation*, Fourth Edition, Section 1564.

“Time for redemption. Redemption, to be effective, must be made within the time specified in the governing statute, unless otherwise agreed upon by the parties; and circumstances of excuse, like the prevalence of civil war, cannot enlarge the time when the statute does not provide for it \* \* \*.”

*Lachmund v. Johnson*, 47 Cal. App. (2d) 377, at page 379.

“It is undoubtedly true that ‘The right of redemption comes entirely from the statute, and it is subject to all the limitations and conditions therein imposed’, *Quinn v. Kenney*, 47 Cal. 147 at 150, and that it is ‘competent for the legislature to fix the precise terms upon which the owner may be entitled to have his property restored to him’. *Anderson Co. v. Los Angeles County*, 55 Cal. App. 585 at 587, 203 Pac. 1040.”

*Sutter-Yuba Invest. Co. v. Waste*, 21 Cal. (2d) 781 at 785.

“As this court said in *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530, 80 Pac. 931 at 933, ‘the provisions of the law authorizing redemption, Political Code Sec. 3817, are to be regarded simply as an offer by the state to release its claims to the land sold upon the terms proposed’. There is no constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. ‘The right of redemption comes entirely from the statute, and is subject to all the limitations and conditions therein imposed.’ *Quinn v. Kenney*, 47 Cal. 147.”

It is appellant’s contention that on July 1, 1942, when the bid of appellant was accepted at public auction, the right of redemption residing in the appellees terminated and ceased.

See Section 3771a of the Political Code of the State of California which provides in part as follows:

*“After such bid has been made and accepted, the right of redemption shall cease \* \* \*.”*

See also the case of *United States v. Certain Lands in the Town of Hempstead*, 129 Federal (2d) 918, where the Court said:

*“Condemnation should not extend the statutory period of redemption any more than it should obliterate the effect of the expiration of the period. The right of redemption from a tax sale can be exercised only in the manner permitted by statute.”*



It is axiomatic that the award takes the place of the land and is a substitute therefor. It has been said that condemnation is an involuntary sale. The right to possession of the award by appellant becomes absolute where there has been a failure of redemption in the manner prescribed by statute.

To hold that the Court could pay the appellant the amount of the tax sale after the period of redemption had expired, would be making the Federal Court a court of appeals and extending the period of redemption beyond the statutory period. This court has no right to do so. This would be an invasion of property rights that are vested and fixed by statute.

Remember the owner failed in his duty to redeem. There must be a fault before there can be a default. Should the purchaser at a tax sale be punished while the owner benefits by delaying? Can he by his own malfeasance extend his own time to redeem?

---

**APPELLANT IS ENTITLED TO THE COMPENSATION  
AND AWARD FOR SAID PROPERTY.**

It was appellees' contention in the District Court that as title to the property passed to the United States on April 22, 1942, by reason of the judgment filed herein on said date, the subsequent tax sale to appellant on July 1, 1942, was therefore null and void.

It is appellant's contention that the tax sale is not void merely because it failed to convey title to the property which was in the United States at the time



of such sale. The tax deeds being ineffectual to pass title to the property, conveyed to appellant the right to the compensation for the property so taken by the United States. The condemnation award stands as a substitute for the land; and the subsequently executed tax deeds to appellant, since they could not convey title to the land, carried the right to the award.

The case of *United States v. Certain Lands in the Town of Hempstead*, 129 Federal (2d) 918, decided July 21, 1942, is identical on all fours to the facts of the case at bar. The *Hempstead* case was decided by the Circuit Court of Appeals of the State of New York and reversed the decision of the District Court of the United States of the District of New York. The case of *United States v. Certain Lands in the Town of Hempstead* reads as follows:

“This proceeding was commenced by the United States in July, 1937, to acquire for military purposes several parcels of land, including one known as ‘damage parcel 121’ and alleged to be owned by Boris and Molly Kramer. The district Court appointed appraisal commissioners who awarded the sum of \$558 as just compensation for parcel 121, and this sum was deposited in court on November 30, 1939. Title to the premises thereupon vested in the United States. In July, 1936, the property had been sold to the County of Nassau for 1934 taxes. The period for redemption from such sale was four years. The Kramers, who reside in Palestine, neither redeemed from the tax sale during that period nor applied at any time for payment of the condemnation award on deposit in the district court. On February 6, 1941,

the County received a tax deed to the premises and a month later applied to the court for payment to it of the entire award. The Kramers did not appear in the proceeding and the court directed counsel for the United States to examine into the facts and report to it as *amicus curiae*. Thereafter, on October 2, 1941, an order was entered directing payment to the county of the taxes, interest and penalties due on November 30, 1939, amounting to \$110.52, and payment of the balance of the award to the Kramers. From this order the county appealed. The question presented lies within narrow compass: *It is whether a purchaser at a tax sale, who acquires the tax deed after the title to the premises has vested in the United States by condemnation, is entitled to the entire award.* In our opinion the answer must be in the affirmative.

If the period of redemption had expired before the condemnor acquired title, it could scarcely be doubted that a subsequently executed tax deed would carry the right to the award.

*In the case at bar the period of redemption had not expired before title vested in the United States, but we see no reason why this should necessitate a different result. Condemnation should not extend the statutory period of redemption any more than it should obliterate the effect of the expiration of that period. The right to redeem from a tax sale can be exercised only in the manner permitted by statute. Condemnation should affect the rights of parties having interests in respect to land taken only so far as necessary to assure the sovereign's title.\* \* \* Since the award takes the place of the land it is reason-*

*able to require the owner to redeem in order to obtain the award, just as he would have to do to recover the land, had condemnation not intervened. If the rule were otherwise the inequitable result would be that the former owner could reserve his privilege to redeem until he learned whether the award would be greater or less than the sum required to exercise the privilege. \* \* \* Finally, it may be noted that the Kramers could have applied to the court to withdraw the deposit or part thereof, and could thereby have obtained the funds with which to redeem the tax sale certificate before the expiration of the period of redemption. As this did not occur, we think the tax deed was effective to carry the right to the entire award."*

The judgment of the District Court is erroneous in two additional particulars:

1. The judgment provides that Paul Merrill is entitled to 9-2/3/70th of the sum of \$2600.00 less the sum of \$242.46.

In this connection, Paul Merrill has not even appeared in this case. There is no pleading on file in this cause on his behalf. Paul Merrill was not represented at the trial of this case or any other step in the proceedings herein. Yet the judgment herein provides for payment to him of 9-2/3/70th of the sum of \$2600.00 less the sum of \$242.46.

2. The judgment provides that there is due the City and County of San Francisco the sum of \$242.46.

This is directly contrary to the evidence in this case. The uncontradicted evidence in this case shows

that on July 21, 1942, this appellant had paid said City and County of San Francisco said sum of \$242.46 and more, as and for delinquent taxes on said property.

We also wish to call the attention of this Court to that principle of law that where the validity of the proceedings, upon which a tax title is dependent is in question, the presumption is always in favor of the regularity, and not against the regularity. This principle is laid down definitely by the Code of Civil Procedure of the State of California. Section 1963, subdivision 15 provides as follows:

“That official duty has been regularly performed.”

Not only that, but the Supreme Court of the State of California has so held in numerous instances, to-wit:

*Western Union Telegraph Co. v. Los Angeles*,  
160 Cal. 124 at page 126,

where the Court said:

“It cannot be doubted that the presumption is always in favor of the validity of an assessment, and that the burden of showing the contrary is on the person claiming to be aggrieved. Independent of special statutory provisions relative to presumptions in favor of assessments, *the general presumption that public officers have regularly performed their duties and that official duty has been regularly performed (Code Civ. Proc. Subd. 15, Section 1963), applies to official action in tax matters. The presumption in all proceedings relating to taxes is in favor of regularity.*”



See, also, the case of

*Davis v. Pacific Improvement Co.*, 137 Cal. 245,  
at page 250,

where the Supreme Court of the State of California said:

“The rule at one time prevailed, requiring the claimant under a tax deed to make strict proof and exact proof of every step to be taken in the proceeding under which the property was sold, has been greatly relaxed by modern legislation, and the speculative nature of purchases at tax sales has been thereby removed. Such legislation in this state is shown by the provisions of the Political Code making the deed *prima facie* evidence of all acts necessary for acquiring jurisdiction to make the sale, and conclusive as to all proceedings taken in the exercise of the jurisdiction thus acquired, and also by the provision in Section 3883 that no ‘Informality’ in any act relating to the assessment or collection of taxes shall render the tax illegal. The duty of the owner of land to pay taxes therein and the right of the state to enforce their collection is not changed, but *the inducement that under the former system was held out to the owner not to pay the taxes, in the hope that some trifling and immaterial defect in the proceedings might be shown to defeat the effect of the sale, has been taken away.*”

Why shouldn't a person, when the owner negligently fails to perform his duty, be protected by the law in the investment of his money? Why shouldn't the state stand behind the title it issues? How is the state to raise money for taxes upon the sales of prop-



erty for delinquent taxes, if it holds out to the world that the title which the state issues to a purchaser is not worth the paper on which it is written? If this is the law, then every person who owns property may as well cease paying taxes on his property. If our courts are going to hold that the state cannot make a valid sale of property for taxes, why pay taxes at all? The courts of this day and time are unanimous in holding that it is the first civic duty of a citizen to pay his taxes. Why shouldn't the man who fails to perform that duty suffer in preference to the tax purchaser, who advances the money to the state with which to pay the expenses of the state?

By the negligence of the property owner his property is sold. Why should the property owner who is guilty of negligence recover his property? Is this equity? We think not. The negligence of the property owner caused the sale. The law aides the diligent only. Where one of two innocent persons must suffer by the act of a third person, he whose negligence caused the loss must suffer.

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#### CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, San Francisco,  
January 21, 1946.

MATHEW WEBER,

*Attorney for Appellant.*

No. 11,154

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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FRANK M. WEBER,

*Appellant,*

VS.

EVA M. WELLS, OLGA K. NEWPORT, ERNEST  
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PAUL MERRILL,

*Appellees.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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*Attorney for Appellees.*

FILED

FEB 20 1948

PAUL P. O'BRIEN



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No. 11,154

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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73

FRANK M. WEBER,

*Appellant,*

vs.

EVA M. WELLS, OLGA K. NEWPORT, ERNEST  
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MILLER, ALMA H. SILVA, LILLIAN ARNEY,  
LOWELL HERIFORD, WALTER MERRILL and  
PAUL MERRILL,

*Appellees.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

## BRIEF FOR APPELLEES.

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### THE FACTS.

On April 4th, 1942, United States of America filed a suit in condemnation affecting certain real property in the City and County of San Francisco, State of California, adjoining Hunter's Point. The appellees were named as defendants. (Page 2, Transcript of Record.)

The City and County of San Francisco and the State of California were also named as defendants. (Page 7, Transcript of Record.)

as nearly as may be, to the practice, pleadings forms and proceedings existing at the time in like causes in the courts of record in the state within which the District Court is held, any rule of the court to the contrary notwithstanding.”

(Title 40, Section 258, USCA.)

Under the provisions of Section 258a, Title 40, U. S. C. A. the United States can take immediate possession of the property by the filing of a declaration of taking in conformity with the section. The section then provides:

“Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, *and the right to just compensation for the same shall vest in the persons entitled thereto.*”

In *Danforth v. United States*, 60 Supreme Court 231, 208 U. S. 271, 84 L. Ed. 240, an action in condemnation, the Court at pages 283 and 284 says:

“Just compensation is value at the time of the taking. The Congress in other situations has adopted the time of taking as the date for determination of value. *For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.* Citing *Kindred v. Union Pacific Railroad Company*, 325 U. S. 582

at 597; In *Roberts v. Northern Pacific Railway Company*, 158 U. S. 1, 10, the precedents are collected."

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IT WAS THE DUTY OF THE FEDERAL COURT TO WITHHOLD SUFFICIENT FUNDS FOR THE PAYMENT OF TAXES FROM THE AWARD TO THE OWNERS.

*United States v. Certain Lands situated in the City of St. Louis*, 51 Fed. Supp. 80 (U. S. District Court, Eastern District of Missouri, decided August 17th, 1943), the Court says, at page 82:

"When the federal government acquires the property for federal use there can be no payment or appropriation of the property for the payment of due and unpaid taxes. (Citing *U. S. v. Alabama*, 313 U. S. 274, 61 Sup. Ct. 1011, 85 L. Ed. 1327.)"

The Court then proceeds to say:

"It is the duty of the court to protect the local municipality by withholding from the fund which stands in the place of the property the amount of the tax debt."

In *United States v. 9.94 Acres of Land in City of Charleston*, 51 Fed. Supp. 480, the Court, at page 485 says:

"In my opinion he (the owner) is entitled to receive a definite fixed payment representing the value of the property *at the time of taking*."

The Court then goes on to say on the same page:

"The defendants point out that the county and municipal authorities are threatening to enforce

liens for taxes and assessments, and raise the question as to whether the deposits made in court should be applied to the liquidation of the same. Since I hold that the taxes and assessments are liens against the respective parcels, I am of the opinion that such deposits may be applied for such purposes.”

In *United States v. Bennett*, Eastern District of Washington, Northern District, 57 Fed. Supp. 670, the Court at page 673 says:

“The determination of the person entitled to compensation out of the award must be made as of November 16th, 1942, the date of the filing of the declaration of taking ‘For the reason that compensation is due at the time of taking the owner at that time, not the owner at an earlier or a later date, receives the payment’. *Danforth v. U. S.*, 308 U. S. 271, 284, 60 S. Ct. 231, 236, 84 L. Ed. 240. The award stands in the place of the property. *Washington Water Power Co. v. U. S.*, 9 Cir. 135 Fed. 2d. 541.”

And at page 674, the Court says:

“The statute U. S. C. A. 258a provides: ‘The court shall have power to make such orders in respect to liens and encumbrances \* \* \* and other charges, if any, as shall be just and equitable’. \* \* \* The Swansons are entitled to any portion of the award in excess of the amount of the mortgage judgment.”

In *Meadows v. U. S.*, 144 Fed. (2d) 751, the Court at page 753 says:

“The value of property once determined in a proper proceeding, the sum so determined stands in the place of the property and can be dis-



tributed upon the adjudication of the value of the respective interests. *U. S. v. Dunnington*, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996, *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.”

*United States v. 150.9 Acres of Land, more or less, in Milwaukee County, Wisconsin*, 135 Fed. (2d) 878. The Court in discussing the effect of liens against property at the time of the declaration of taking states, at page 880 says:

“The fair market value paid into court took the place of the property, and liens, if any, attached to the fund.

*U. S. v. Dunnington*, 146 U. S. 338, 351, 13 S. Ct. 79, 36 L. Ed. 996. *People of Puerto Rico etc. v. U. S.*, 1 Cir., 134 Fed. 2d. 267, 271. *U. S. v. Certain Lands in Brooklyn*, 2 Cir. 129 Fed. 2d. 577, 579. *Cobo v. U. S.* 6 Cir. 94 Fed. 2d. 351, 352. *U. S. v. Certain Parcels of Land D. C.* 44 Fed. Supp. 936, 937. We think it clear, therefore, that the United States was not liable, nor was the property after it had been taken.”

In *Empie v. United States*, C. C. A. 4th Cir. 131 Fed. (2d) 481, the Court says, at page 483:

“The general rule is that compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of taking and not to the owner at an earlier or later date, *Danforth v. U. S.*, 308 U. S. 271, 284, 60 S. Ct. 231, 84 L. Ed. 240, *Roberts v. N. Pac. R. R.* 158 U. S. 1, 10, 15 S. Ct. 756, 39 L. Ed. 873. *Kindred v. U. P. R. Co.* 225 U. S. 582, 597, 32 S. Ct. 780, 56 L. Ed. 1216. *Empie* bases his claim on this rule.”



**THE LAW OF THE STATE OF CALIFORNIA IS APPLICABLE  
AS TO THE PAYMENT OF COMPENSATION.**

The principle that the right to compensation shall be determined in accordance with the laws of the state in which the proceedings are instituted has been enunciated in the case of *Empie v. United States of America*, 131 Fed. (2d) 481 (C. C. A. N. C. 1942.)

Under the law of the State of California the right to compensation for the taking of private property is a personal one, and such compensation must be paid to the owners as their respective interests appear at the time when the taking of the property for a public use is deemed to occur.

The Supreme Court of the State of California, on September 19th, 1944, in the case of *The People v. Klopstock*, 24 Cal. (2d) 897 at 902, 24 A. C. 889 at 894, enunciates the same principle, where it is said:

“The state Constitution (art. I, Sec. 14) provides that compensation for the taking of private property shall be paid to the owners. In fixing awards in condemnation cases compensation must be paid to the owners as their respective interests shall appear at the time when the taking of property for a public use is deemed to occur—at the date of the issuance of summons. (Code Civ. Proc., Sections 1248, 1249; *Brick v. Cazaux*, 9 Cal. 2d 556 (71 P. 2d 588); *City of Los Angeles v. Blondeau*, 127 Cal. App. 139, 140 (15 P. 2d. 554); *People v. Joerger*, 12 Cal. App. 2d. 665, 671 (55 P. 2d. 1269).)”

In *Towne v. City of Los Angeles*, 4 Cal. App. (2d) 418 at 420, the Court says:

“The award is payable to the one who owns the property at the time it is taken in the condemnation proceedings. Plaintiff became entitled to the award when the interlocutory decree became final. Title passed to the public when the interlocutory judgment was entered and the money paid into court. C. C. P. 1253. *McDaniels v. Dickey*, 219 Cal. 89.”

In *Russakov v. McCarthy Co.*, 206 Cal. 682 (275 Pac. 808) it is said at page 686:

“That a person, to be entitled to moneys awarded as compensation for the condemnation of property, must establish an interest or estate in the thing condemned, is, as an abstract proposition of law unquestionably sound. *But the right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land after the right accrues* in the absence of an express agreement to that effect.”

There can be no question but what the title to the real property at the time of the filing of the suit and the judgment of declaration of taking was vested in the owners as set forth above. The fact that a sale to the State of California was made in June, 1937, did not deprive the owners of their title. The title remained in the owners, subject to the lien in favor of the state, created by the assessment and tax levy. Prior to the expiration of the five year period of redemption title to the property was taken by United States and the right to compensation for such taking immediately vested in the then owners of the property, subject only to the payment to the City and County

**CONCLUSION.**

Under the authorities heretofore cited by appellees, it is submitted that these appellees are entitled to the award made by the lower Court, and that the appellant had no interest in the real property or in the award at the time of the declaration of taking; that the City and County of San Francisco was without jurisdiction to direct a sale of the real property after the judgment of declaration of taking, and the appellant acquired no rights in the award by the purchase of the real property at the tax sale.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,  
February 20, 1946.

ROYAL E. HANDLOS,  
*Attorney for Appellees.*

No. 11155

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

FILED

NOV 27 1945

PAUL P. O'BRIEN,  
CLERK





No. 11155

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

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MAURICE R. McMICKEN, ESQ.,

For Comm'r.:

W. H. PAYNE, ESQ.,

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Docket No. 4969

GEORGE W. YOST,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1944

May 17—Petition received and filed. Taxpayer notified. Fee paid.

“ 18—Copy of petition served on General Counsel.

“ 19—Request for hearing at Seattle, Washington filed by taxpayer. 5/31/44 granted.

Jun. 20—Answer filed by General Counsel.

“ 23—Copy of answer served on taxpayer. Seattle, Washington.

Aug. 31—Hearing set Oct. 30, 1944 at Seattle, Washington.

1944

- Nov. 2—Hearing had before Judge Mellott on merits. Submitted. Stipulation of facts filed. Petitioner's brief due in 45 days respondent's 30 days—20 days for reply.
- Dec. 16—Brief filed by taxpayer. 12/18/44 copy served.

1945

- Jan. 16—Brief filed by General Counsel.
- “ 17—Transcript of hearing of 11/2/44 filed.
- Feb. 5—Reply brief filed by taxpayer. 2/5/45 copy served.
- May 28—Opinion rendered Mellott J. Decision will be entered for the respondent.
- “ 28—Decision entered, Mellott J. Div. 12.
- Aug. 24—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.
- “ 25—Proof of service filed.
- Sep. 17—Designation of record filed by taxpayer with proof of service thereon.
- “ 18—Copy of an order from 9th Circuit extending time to 10/31/45 to transmit the record filed.
- “ 18—Copy of an order from 9th Circuit directing the Clerk to transmit a complete record in Docket 4969 to this Court and an abbreviated record in Docket 4970 filed.

The Tax Court of the United States

Docket No. 4969

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:90D:IG, dated March 23, 1944, and as a basis of this proceeding alleges as follows:

I.

The petitioner is an individual residing at Edmonds, Washington, and at all times herein mentioned was, and still is, the husband of Juanita Yost. Petitioner's separate income tax returns for the periods here involved, namely, for the calendar years 1940 and 1941, were filed with the Collector for the District of Washington, at Tacoma, Washington.

II.

The Notice of Deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on [2\*] March 23, 1944.

III.

The taxes in controversy are income taxes for

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\*Page numbering appearing at top of page of original certified Transcript.

the calendar years 1940 and 1941, the total deficiency asserted being \$1,174.14, made up of \$75.44 deficiency for the year 1940 and \$1,071.70 deficiency for the year 1941, whereas petitioner claims that the correct deficiency for 1940 is only \$2.57, and that there is no deficiency for 1941, so that the amount in controversy is \$1,171.57.

#### IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

1. Respondent erred in determining that \$1,301.82 received by petitioner in 1940 as his community one-half of \$2,603.65, paid by Robert L. Newell and Richard B. Newell, constituted ordinary income of petitioner.

2. Respondent erred in not holding that said amount of \$1,301.82 so received by petitioner in 1940 was a long-term capital gain to petitioner.

3. Respondent erred in determining that \$6,400.00 received by petitioner in 1941 as his community one-half of \$12,800.00, paid by Robert L. Newell and Richard B. Newell, constituted ordinary income of petitioner.

4. Respondent erred in not holding that said amount of \$6,400.00 so received by petitioner in 1941 was a long-term capital gain to petitioner.

#### V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:



1. For a number of years prior to January 28, 1935, Richard B. Newell was draftsman and chief engineer for Heiser's, Inc., manufacturers of bus and truck bodies at Seattle, Washington; Robert L. Newell had been engaged in the [3] sale throughout the Pacific Northwest of bus and truck bodies manufactured by Wentworth & Irwin, of Portland, Oregon; and George W. Yost had been, and still is, engaged in the bus passenger transportation business in suburban Seattle as part owner and general manager of Suburban Transportation System.

2. For some time prior to January 28, 1935, the two Newells had discussed with Yost the formation of a new corporation to manufacture bus and truck bodies. As a result thereof the three of them, as incorporators, on January 28, 1935, organized for that purpose Tricoach Corporation, a Washington corporation, with its principal office at Seattle, and thereafter and at all times herein mentioned the three of them owned all of the outstanding stock of the corporation and they were the only officers and directors of the corporation.

3. Tricoach Corporation had an authorized capital of \$50,000.00, composed of 1,000 shares of common stock of the par value of \$50.00 each. In the articles of incorporation Yost subscribed for 150 shares and each of the Newells subscribed for 5 shares, which subscriptions were paid in cash at the first meeting of the incorporators, Yost paying

\$7,500.00 out community funds of himself and wife, Juanita Yost, and the Newells paying \$250.00 each.

4. At the first meeting of directors, held on February 6, 1935, Robert L. Newell was elected president and sales manager, Richard B. Newell was elected vice president and chief engineer, and George W. Yost was elected secretary, which offices they continued to hold during the entire operations of the company.

5. The salary of the two Newells was originally fixed at \$250.00 per month and, in addition thereto, the two Newells and Yost were each to receive adjusted compensation at the end of each calendar year of one-third of that amount of the net profits for such year as was in excess of an amount necessary to pay eight per cent dividends on all stock outstanding at the beginning of the year.

6. For the eleven months of 1935, Tricoach Corporation had net sales of \$82,805.39, but for the year it had a deficit of \$1,068.18 after payment of \$2,750.00 to each of the Newells in payment of their monthly salaries.

7. For the year 1936, Tricoach Corporation had net sales of \$231,503.81 and a net income of \$13,-812.05 before taxes but after deductions of salaries and adjusted compensation to the three stockholder-officers.

8. The Newells' salaries were increased to \$300.00 [4] per month each as of July 1, 1936, so that the amounts paid as salaries and adjusted

compensation in 1936 to the Newells and Yost were as follows: Robert L. Newell, \$13,440.95; Richard B. Newell, \$13,440.95; and George W. Yost, \$10,140.95, or a total of \$37,022.85 paid to the three officers in 1936.

9. Up to December 16, 1936, the outstanding capital of the corporation had remained at \$8,000.00, the amount originally paid in. On that date the three stockholders made a contribution to capital, as paid-in surplus, in proportion to their stockholdings, of sufficient to wipe out the 1935 deficit of \$1,068.18 and then declared a dividend of \$80.00 per share, but not to exceed the net profits for the year. As a result thereof, Yost received \$11,649.64 in dividends on his 150 shares, and each of the Newells received \$388.32 on their respective 5 shares each.

10. On December 16, 1936, subscriptions were accepted for the issuance of additional stock as follows:

George W. Yost	348 shares	\$17,400.00
Robert L. Newell	208 "	10,400.00
Richard B. Newell	208 "	10,400.00

which amounts were charged to their respective accounts and said stock issued, so that as of December 31, 1936, there were outstanding 924 shares of stock, or a total paid-in capital of \$46,200.00.

11. For the year 1937, Tricoach Corporation had net sales of \$341,887.18 and a net income of \$17,762.56 before taxes but after payment of salaries and adjusted compensation to the three stockholder-

officers, of a total of \$42,983.13, of which amount each of the Newells received \$15,527.71 and George W. Yost received \$11,927.71 in 1937.

12. On December 2, 1937, subscriptions were accepted for the issuance of additional stock as follows:

George W. Yost	12 shares	\$ 600.00
Robert L. Newell	32 “	1,600.00
Richard B. Newell	32 “	1,600.00

which amounts were charged to their respective accounts and said stock issued, so that thereafter all the authorized stock of 1,000 shares were held: 510 shares by Yost and 245 shares by each of the Newells.

13. On December 27, 1937, there was declared a dividend of \$20.00 per share, but not to exceed the net profits [5] for the year 1937, as a result of which Yost received \$7,968.08 in dividends on his 510 shares, and each of the Newells received \$3,827.81 on his respective 245 shares.

14. As of the end of 1937, Yost, on his original investment of \$7,500.00 in the Tri-coach Corporation, had received from the corporation, in the two years 1936 and 1937, a total of \$41,686.38 in salary and dividends, of which amount he paid back to the company \$1,001.42 to cover his pro rata of the 1935 deficit and \$18,000.00 for 360 additional shares of stock, which still left him with a net amount of \$22,684.96, and he owned 510 fully paid up shares, or 51% of the stock of Tricoach Corporation.

15. As of November 1, 1937, the two Newells



and Yost formed a partnership under the name of Tricoach Sales Company, to carry on the general business activities appertaining to the wholesale and retail distribution of motor vehicles and trading in commercial paper relating to such transactions. The Newells each contributed \$10,000.00 and Yost \$20,000.00, Yost having a 50% interest and each of the Newells a 25% interest in the partnership. Robert L. Newell was to devote most of his time to the partnership as general manager in charge of all sales promotion activities of the firm and was to receive \$200.00 a month, which was to be considered an expense of the business before ascertaining the net profits of the firm's business. Richard B. Newell was to have charge of all matters relating to engineering services and construction, specifications and purchase contracts. George W. Yost was to approve all transactions relating to extended time payment, the purchase and sale of commercial paper, the borrowing of funds, and other similar financial matters. For the two months in 1937 the firm's net profits were \$526.00, of which amount Yost's share was \$263.00.

16. In March, 1936, Heiser's, Inc., made an assignment for the benefit of creditors, and during said year all its machinery and equipment was sold to Pacific Car & Foundry Co., which installed said machinery and equipment in its Renton plant and started a bus-body manufacturing plant in competition with Tricoach Corporation, but such venture resulted in a considerable loss to the Pacific Car & Foundry Co. in each of the years 1936 and 1937.



17. For several months throughout 1938, Pacific Car & Foundry Co. negotiated with the Newells and Yost for the purpose of accomplishing a merger or consolidation or some other method to eliminate the competition of Tricoach Corporation and to secure the services of the two Newell brothers to manage the production and sales of the Motor Coach Division of Pacific Car & Foundry Co.

18. The arrangement finally worked out contemplated [6] the leasing by Tricoach Corporation of all its machinery and equipment to the Newells for ten years, together with an option to them to purchase, by December 31, 1938, at its depreciated book value, said machinery and equipment, and the Newells were to sublease to Pacific Car & Foundry Co. all of said Tricoach Corporation's machinery and equipment for  $7\frac{1}{2}$  years from October 1, 1938, and it was to be moved at Pacific's expense to its Renton plant. Pacific was to operate its Motor Coach Division for  $7\frac{1}{2}$  years from October 1, 1938, and to employ the Newells for said period at a minimum salary of \$250.00 per month each and, in addition thereto, to pay each of the Newells  $\frac{1}{6}$  of the profits of the business of the Motor Coach Division earned during said term. Richard B. Newell was to have charge of and manage the production end and Robert L. Newell was to manage the balance of the business of the Motor Coach Division. Pacific was to purchase, as needed, for cash, at then market prices, all of Tricoach Corporation's materials inventory and Pacific was to

furnish free storage space therefor if said inventory was moved to its Renton plant. Tricoach was not to compete with the business of the Motor Coach Division in the Pacific Northwest during the life of the agreement.

19. As such proposed arrangement would mean liquidation of the affairs of Tricoach Corporation, whereby Yost would receive only approximately the par value of his Tricoach stock, he was unwilling to agree to such an arrangement unless he was to receive some additional payment or some share of the substantial profits it was contemplated would be made by the Motor Coach Division with the elimination of the competition of Tricoach Corporation.

20. According, to induce Yost to agree to the proposed arrangement, which necessitated the liquidation of Tricoach Corporation, each of the Newells agreed with Yost that if Yost would agree to the consummation of the proposed arrangement and would also loan each of them, without interest, \$4,187.83 to be used by each of them to purchase from Tricoach its machinery and equipment, which the Newells were to sublease to Pacific, each of the Newells would pay to Yost an amount equivalent to one-third of the first \$37,500.00 each of the Newells should receive out of their respective shares of one-sixth of the prospective profits of the Motor Coach Division, to be paid to Yost within three days after the Newells had received their settlement of said profits. One-half of all such payments was to be applied by Yost in payment of the \$4,187.83 to

be loaned by Yost to each of the Newells until such loans were paid in full.

21. Such arrangement being satisfactory to Yost, at a joint meeting of the stockholders and directors of [7] Tricoach Corporation held August 2, 1938, a resolution was adopted to suspend the manufacturing operations of the corporation on or about October 1, 1938; to gradually liquidate its affairs; to enter into the proposed agreement with Pacific Car & Foundry Co.; and to enter into a lease-agreement with the Newells for lease of the corporation's manufacturing machinery and equipment, with an option whereby they might purchase such machinery and equipment on or before December 31, 1938, for each, at its depreciated book value.

22. Thereafter, on August 3, 1938, a four-party agreement was duly entered into between Pacific Car & Foundry Co. as first party, the two Newells as second parties, Tricoach Corporation as third party, and George W. Yost as fourth party, to carry out the proposed arrangement.

23. On said August 3, 1938, George W. Yost entered into two separate, identical contracts, one being with Richard B. Newell and the other being with Robert L. Newell, to evidence their respective agreements with Yost in regard to payment to Yost of a share of the respective profits to be received by each of the Newells out of the Motor Coach Division business.

24. In 1940, each of the Newells paid to Yost,

under this last-mentioned agreement, \$2,603.65, and of this \$5,207.30 so received from the two Newells, \$2,603.65 was applied toward payment of their respective loans, and the other half, or \$2,603.65, was treated as a capital gain of the community composed of Mr. and Mrs. Yost.

25. In June 1940, George W. Yost received from the Tricoach Corporation a liquidating dividend of \$25,500.00 in complete liquidation and redemption of his 510 shares of stock of the corporation, which stock had cost him \$26,501.42, resulting in a community capital loss of \$1,001.42.

26. In 1941, each of the Newells paid to Yost, under the above-mentioned agreement, \$9,286.00, and of this \$18,572.00 so received from the two Newells, \$5,772.01 was applied toward payment of the balance of their respective loans and the remainder, \$12,799.99, was treated as a capital gain of the community composed of Mr. and Mrs. Yost.

27. In 1942, Yost received an additional amount of \$1,220.68 from the two Newells, which amount was treated as a capital gain of the community composed of Mr. and Mrs. Yost. This made the total received by him from the two Newells of \$24,999.98, of which amount \$8,375.66 was applied in repayment of their loans to him and the balance of \$16,624.32 was treated as a capital gain of the community composed of Mr. and Mrs. Yost in the respective years in which it was received. [8]

28. In petitioner's 1940 Income Tax Return there was reported as a long-term capital gain



\$1,301.82, being his community one-half of the \$2,603.65 received from the two Newells in 1940 after the above-mentioned application on their indebtedness, upon the theory of its being an additional payment to him by them for his community interest in Tricoach Corporation for discontinuance of its business and its liquidation, and as such long-term capital gain there was taken into account, for tax purposes, only 50% thereof, or \$650.91.

29. Respondent in his Deficiency Letter held that said amount of \$1,301.82, received by petitioner in 1940, was not a capital gain but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1940 by \$650.91.

30. That if said amount of \$1,301.82 was correctly reported as a long-term capital gain and only 50% thereof was to be taken into account for income tax purposes, then, due to certain other adjustments made by respondent in his Deficiency Letter, and to which no exception is taken, the correct deficiency for 1940 would be only \$2.57.

31. In petitioner's 1941 income tax return there was reported as a long-term capital gain \$6,400.00, being his community one-half of the \$12,800.00 received from the two Newells in 1941 after the above-mentioned application on the balance of their indebtedness, upon the theory of its being an additional payment to him by them for his community interest in Tricoach Corporation for discontinuance of its business and liquidation, and as such long-



term capital gain there was taken into account, for tax purposes, only 50% thereof, or \$3,200.00.

32. Respondent in his Deficiency Letter held that said amount of \$6,400.00 was not a capital gain, but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1941 by \$3,200.00.

33. That if said amount of \$6,400.00 was correctly reported as a long-term capital gain and only 50% thereof, or \$3,200.00, was to be taken into account for income tax purposes, then there would be no deficiency for 1941.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that the deficiency due from [9] petitioner for 1940 is not in excess of \$2.57, and that there is no deficiency for 1941.

ALFRED J. SCHWEPPE

MAURICE R. McMICKEN

Counsel for Petitioner.

State of Washington,  
County of King—ss.

George W. Yost, being first duly sworn, says:  
That he is the petitioner above named; that he has read the foregoing Petition and is familiar with

the statements contained therein, and that the statements contained therein are true.

GEORGE W. YOST

Subscribed and sworn to before me this 13th day of May, 1944.

[Seal]

JANE CARMODY

Notary Public in and for the State of Washington,  
residing at Seattle. [10]

EXHIBIT "A"

SN-IT-1

Treasury Department  
Internal Revenue Service  
Seattle 4, Washington

March 23, 1944

Office of  
Internal Revenue Agent in Charge  
Seattle Division  
350 Federal Office Building

IT:90D:IG

Mr. Geo. W. Yost  
Edmonds, Washington

Dear Mr. Yost:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1940 and December 31, 1941, discloses a deficiency of \$1,147.14 as shown in the statement attached.

In accordance with the provisions of existing

internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day), from the date of the mailing of this letter, you may file a petition with Tax Court of The United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle 4, Washington for the attention of IT:90D:IG

The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

JOSEPH D. NUNAN, Jr.,

Commissioner,

By (signed) S. R. STOCKTON

Internal Revenue Agent in  
Charge

Enclosures:

Statement.

Form of waiver.

IG:EGG [11]

## Statement

Mr. Geo. W. Yost, Edmonds, Washington

Tax Liability for the Taxable Years Ended  
December 31, 1940 and December 31, 1941

## Income Tax

	Liability	Assessed	Deficiency
1940 .....	\$ 565.77	\$ 490.33	\$ 75.44
1941 .....	3,271.66	2,199.96	1,071.70
<hr/>			
Total .....	\$3,837.43	\$2,690.29	\$1,147.14

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated April 7, 1943; to your protest dated September 25, 1943; and to the statements made at the conferences held on October 14, 1943, November 24, 1943 and March 13, 1944.

Amounts received from Robert L. and Richard B. Newell in 1940 and 1941 are held to be ordinary income as distinguished from capital gain for the reasons that (a) the amounts were not received from the sale or exchange of a capital asset as defined by Section 117 of the Internal Revenue Code and (b) the amounts were not distributed by a corporation in complete cancellation or redemption of all of its stock in accordance with a plan of liquidation under which the transfer of its property was to be completed within a time specified in the plan, not exceeding three years. Section 115(c), Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Maurice R. Mc-

Micken, 657 Colman Building, Seattle, 4, Wash-  
ington, in accordance with the authority contained  
in the power of attorney executed by you.

Taxable Year Ended December 31, 1940

Adjustments to Net Income

Net income as disclosed by return.....		\$8,961.21
Unallowable deductions and additional income:		
(a) Amounts received from Robert L. and Richard B. Newell.....	\$650.91	
(b) Dividends .....	46.73	
(c) Contributions and taxes.....	110.59	808.23
		<hr/>
Net income adjusted.....		\$9,769.44

Explanation of Adjustments

(a) There was included as a capital gain on  
your return your community one-half of the  
amounts received by you and your wife from Robert  
L. and Richard B. Newell. Since it is held that  
the amounts received are ordinary income, adjust-  
ment is made accordingly as shown by the following  
computation:

	Total Community	One-half
Amounts received and held to be ordi- nary income .....	\$2,603.65	\$1,301.82
Taken into account on your return (50%) .....	1,301.83	650.91
	<hr/>	<hr/>
Adjustment .....	\$1,301.82	\$ 650.91

(b) It has been determined that the distribu-  
tions of \$984.00 you received from the A. M. Yost  
Estate, Inc., represented taxable dividends to the  
extent of \$622.64. You reported taxable dividends



from the source in the amount of \$575.91. There is accordingly added to income the amount of \$46.73, the difference between \$622.64 and \$575.91.

(c) One-half of the deductions for contributions and taxes paid with community funds in the amount of \$110.59 is disallowed since such one-half is allowable as a deduction in computing the taxable net income of your wife.

### Computation of Tax

Net income adjusted.....		\$9,769.44
Less: Personal exemptions .....	\$911.32	
Credit for dependents.....	800.00	1,711.32
		<hr/>
Balance (surtax net income).....		\$8,058.12
Less: Interest on Government obligations	15.75	
Earned income credit.....	300.00	315.75
		<hr/>
Balance subject to normal tax.....		\$7,742.37
Normal tax at 4% on \$7,742.37.....		309.69
Surtax on \$8,058.12.....		204.65
		<hr/>
Total normal tax and surtax.....		\$ 514.34
Defense tax (10% of \$514.34).....		51.43
		<hr/>
Total income tax liability.....		\$ 565.77
Income tax assessed:		
Original, Account No. 200679.....		490.33
		<hr/>
Deficiency of income tax.....		\$ 75.44

## Taxable Year Ended December 31, 1941

## Adjustments to Net Income

Net income as disclosed by return.....	\$13,240.73
Unallowable deductions and additional income:	
(a) Amounts received from Robert L. and Richard B. Newell.....	3,200.00
Net income adjusted.....	\$16,440.73

## Explanation of Adjustments

(a) Amounts received from Robert L. and Richard B. Newell are held to be ordinary income as previously explained:

	Total Community	One-half
Amounts received.....	\$12,800.00	\$6,400.00
Taken into account on return (50%)....	6,400.00	3,200.00
Adjustment .....	\$ 6,400.00	\$3,200.00

## Computation of Tax

Net income adjusted.....		\$16,440.73
Less: Personal exemption.....	\$730.74	
Credit for dependents.....	800.00	1,530.74
Balance (surtax net income).....		\$14,909.99
Less: Interest on Government obligations .....	15.75	
Earned income credit.....	382.63	398.38
Balance subject to normal tax.....		\$14,511.61
Normal tax at 4% on \$14,511.61.....		580.46
Surtax on \$14,909.99.....		2,691.20
Total net income tax liability....		\$ 3,271.66
Income tax assessed:		
Original, Account No. 306793.....		2,199.96
Deficiency of income tax.....		\$ 1,071.70

[Endorsed]: T.C.U.S. Filed May 17, 1944. [14]

[Title of Tax Court and Cause.]

### ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, alleges and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits that the taxes in controversy are income taxes for the calendar years 1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70. Denies the remaining allegations contained in paragraph III of the petition.

IV (1), (2), (3) and (4). Denies that in determining the deficiencies asserted respondent committed any errors and specifically denies that he committed errors as alleged in subparagraphs (1) to (4), inclusive, of paragraph IV of the petition.

V (1). For lack of information on which to base an opinion as to the truth or falsity of the allegations contained in subparagraph [15] (1) of paragraph V of the petition, the same are denied.

(2). Admits that Tricoach Corporation was organized on or about January 28, 1935, by George W. Yost, Robert L. Newell, and Richard B. Newell,

who became the owners of the corporation's capital stock and also its officers and directors. For lack of information denies the remaining allegations contained in subparagraph (2) of paragraph V of the petition.

(3) to (14), inclusive. For lack of information denies each and every material allegation contained in subparagraphs (3) to (14), inclusive, of paragraph V of the petition.

(15). Admits that in the year 1937 George W. Yost and the two Newells organized a partnership under the name of Tricoach Sales Company. For lack of information denies the remaining allegations contained in subparagraph (15) of paragraph V of the petition.

(16). For lack of information denies the allegations contained in subparagraph (16) of paragraph V of the petition.

(17) and (18). Admits that in the year 1938 negotiations were conducted between Pacific Car & Foundry Co. on the one hand and the Newells and George W. Yost on the other, which resulted in certain agreements which were subsequently executed. Denies the remaining allegations contained in subparagraphs (17) and (18) of paragraph V of the petition.

(19). For lack of information denies the allegations contained in subparagraph (19) of paragraph V of the petition.

(20). Admits that an agreement was also negotiated between [16] George W. Yost and the Newells which contemplated, among other things, that certain advances would be made by Yost to the Newell brothers. Denies each and every other material allegation contained in subparagraph (20) of paragraph V of the petition.

(21). Denies the allegations contained in subparagraph (21) of paragraph V of the petition.

(22). Admits that on or about August 3, 1938, a four-party agreement was entered into among Pacific Car & Foundry Co. as first party, the two Newells as second parties, Tricoach Corporation as third party, and George W. Yost as fourth party.

(23) and (24). Admits the allegations contained in subparagraphs (23) and (24) of paragraph V of the petition.

(25). Admits that in the year 1940 George W. Yost received from the Tricoach Corporation the sum of \$25,500.00 on shares of capital stock held by him which had a cost basis of \$26,501.42 on which a community capital loss was claimed in the sum of \$1,001.42. Alleges that in determining the deficiency asserted herein respondent has allowed as a community deduction to petitioner and his wife one-half of the aforesaid capital loss, of \$500.71, or \$250.35 to each.

(26). Admits the allegations contained in subparagraph (26) of paragraph V of the petition.



(27). Denies each and every material allegation contained in subparagraph (27) of paragraph V of the petition.

(28). Admits that in petitioner's 1940 income tax return there was reported as a long-term capital gain \$1,301.82, being his community [17] one-half of the \$2,603.65 received from the two Newells in 1940, after the application on indebtedness referred to in subparagraph (24) of paragraph V above, of which there was taken into account for tax purposes only 50 per cent thereof, or \$650.91. Denies the remaining allegations contained in subparagraph (28) of paragraph V of the petition.

(29). Admits the allegations contained in subparagraph (29) of paragraph V of the petition.

(30). Denies the allegations contained in subparagraph (30) of paragraph V of the petition.

(31). Admits that in petitioner's 1941 income tax return there was reported as a long-term capital gain \$6,400.00, being his community one-half of the \$12,800.00 received from the two Newells in 1941, after the application on indebtedness referred to in subparagraph (26) of paragraph V above, of which there was taken into account for tax purposes only 50 per cent thereof, or \$3,200.00. Denies the remaining allegations contained in subparagraph (31) of paragraph V of the petition.

(32) and (33). Admits the allegations contained in subparagraphs (32) and (33) of paragraph V of the petition.

VI. Denies generally and specifically each and every other material allegation contained in the petition, not hereinbefore specifically admitted, qualified, or denied. [18]

Wherefore, it is prayed that the petitioner's appeal be denied, and that the Commissioner's determination of deficiencies be approved.

(Signed) J. P. WENCHEL WHP  
Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel,  
WILFORD H. PAYNE,  
Special Attorney,  
Bureau of Internal Revenue.

WHP:wmm 6-9-44

[Endorsed]: T.C.U.S. Filed June 20, 1944. [19]

The Tax Court of The United States

5 T. C. No. 16

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

JUANITA YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Docket Nos. 4969, 4970. Promulgated May 28, 1945.

Amounts received by petitioner, under contracts entered into between him and two men who had previously been associated with him and a corporation in which all were interested, which represented a portion of the profits derived by the two men in a new business, held under the contracts, to be ordinary income to petitioner and not to have been derived from the sale or exchange of capital assets.

Alfred J. Schweppe, Esq., and Maurice R. McMicken, Esq., for the petitioners.

W. H. Payne, Esq., for the respondent.

## OPINION

Mellott, Judge: Each of these consolidated cases involves deficiencies in income tax for the calendar years 1940 and 1941 in the amounts of \$75.44 and \$1,071.70. The basic facts have been stipulated and are hereby found. They will be summarized. Additional findings based upon testimony adduced at the trial will be made; but they will be specifically so designated. Inasmuch as the petitioner in Docket No. 4970 is the wife of George W. Yost and filed a separate [20] return of income, identical to that filed by him, and since the questions involved in the two cases are the same, George W. Yost will hereinafter be referred to as the petitioner.

The issue in each case is whether amounts received during the taxable years, under agreements theretofore entered into between petitioner and Richard B. and Robert L. Newell, were capital gains or ordinary income.

For some time prior to the taxable years petitioner had been engaged in the bus passenger transportation business in suburban Seattle as part owner and general manager of Suburban Transportation System. Richard B. Newell and Robert L. Newell (sometimes herein referred to by first name and sometimes as the Newells) had, for some time prior to January 28, 1935, discussed with petitioner the formation of a new corporation to manufacture bus and truck bodies. Richard had been employed for a number of years as draftsman and chief engi-

neer for Heiser's Inc., a manufacturer of bus and truck bodies at Seattle, and Robert had been engaged in the sale throughout the Pacific Northwest of bus and truck bodies manufactured by Wentworth & Irwin of Portland, Oregon.

As a result of the discussion petitioner and the two Newells, on **January 28, 1935**, organized the Tricoach Corporation (hereinafter called Tricoach), a Washington corporation with its principal office at Seattle. Thereafter and at all times herein mentined the three owned all of the outstanding stock of the corporation and were its only officers and directors.

Tricoach had an authorized capital of \$50,000 composed of 1,000 shares of common stock of the par value of \$50 each. Yost subscribed for 150 shares and each of the Newells subscribed for five shares, Yost paying \$7,500 and each of the Newells \$250. Robert was elected president and sales manager, Richard vice-president and chief engineer, and petitioner secretary, which offices they continued to hold during the entire operation of the company. [21]

The salary of the two Newells was originally fixed at \$250 per month; but in addition thereto they and petitioner were each to receive adjusted compensation, at the end of each calendar<sup>1</sup> year, equivalent to one third of the amount of the net

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<sup>1</sup>The stipulation states at the end of each calendar year. The resolution states at the end of each fiscal year. The disparity appears to be immaterial.



profits for the year which should be in excess of an amount necessary to pay eight percent dividends on the outstanding stock.

The result of the operation of Tricoach for 1935, after the payment of the salaries to the Newells and other expenses, was a deficit of \$1,068.18. The deficit was wiped out by the 1936 operations and in December of that year a dividend of \$80 per share, "but not to exceed the net profits for the year," was declared. Petitioner received a dividend of \$11,649.64 and each of the Newells received \$388.32.

On December 16, 1936, 764 additional shares of stock were issued at par, 348 shares to petitioner and 208 shares to each of the Newells. On December 31, 1936 (924 shares were outstanding, the total paid in capital being \$46,200.

The monthly compensation of the Newells was increased to \$300 per month during 1936 and they were paid on such basis for six months of that year. Each therefore received during 1936 \$3,300 as salary. The net income of the corporation for that year was substantial and petitioner and each of the Newells received, during the year, "adjusted compensation" of \$10,140.95, or a total of \$30,422.95.

On December 2, 1937, the remaining 76 shares of the 1,000 authorized by the charter of Tricoach were issued at par, 12 to petitioner and 32 to each of the Newells. The profit of Tricoach was substantial for the year 1937. On December 27, 1937, a dividend of \$20 per share, "but not to exceed the

net [22] profits for the year 1937," was declared, as a result of which petitioner received \$7,968.08 on his 510 shares and each of the Newells received \$3,827.81 on his 245 shares. Petitioner and each of the Newells also received, as "adjusted compensation" for that year, \$11,927.71, and aggregate of \$35,783.13.

The "adjusted compensation" referred to in the preceding paragraphs was in addition to the cash dividends received during 1936 and 1937. Petitioner, on his original investment of \$7,500 in Tri-coach, had therefore received during the two years, the aggregate amount of \$41,686.38, \$19,001.42 of which had been invested by him subsequently in its stock and in making up his portion of the 1935 deficit. At that time he owned 510 of its fully paid-up shares, or 51 percent of its stock.

As of November 1, 1937, petitioner and the Newells formed a partnership under the name of Tri-coach Sales Co. (hereinafter referred to as Sales Co.) to carry on the general business activities appertaining to the wholesale and retail distribution of motor vehicles and trading in commercial paper relating to such transactions. Petitioner contributed \$20,000 and each of the Newells \$10,000, petitioner having a 50 percent interest and Richard and Robert each a 25 percent interest. Robert was to devote most of his time to the partnership as general manager in charge of sales promotion, for which he was to receive a salary of \$200 per month. Richard was to have charge of

all matters relating to engineering services and construction, specifications and purchase contracts and petitioner was to have charge of transactions relating to purchase and sale of commercial paper, borrowing of funds and similar financial matters. For the 2 months in 1937 the firm's net profits were \$526, petitioner's share being \$263. [23]

In March 1936 Heiser's, Inc. (the former employer of Richard) made an assignment for the benefit of creditors and during 1936 all of its machinery and equipment was sold to Pacific Car & Foundry Co. (hereinafter called Pacific). The machinery and equipment was installed in Pacific's Renton plant and a bus-body manufacturing plant was started in competition with Tricoach. The venture resulted in considerable loss to Pacific in each of the years 1936 and 1937.

For several months throughout 1938 Pacific negotiated with the Newells and petitioner for the purpose of accomplishing a merger or consolidation or working out some method to eliminate the competition of Tricoach and to secure the services of the two Newells to manage the production and sales of the motor coach division of Pacific. The arrangement finally worked out contemplated leasing by Tricoach of its machinery and equipment to the Newells for 10 years, together with an option to them to purchase it by December 31, 1938, at its depreciated book value. The Newells were to sublease to Pacific all of the Tricoach machinery and equipment for 7½ years from October 1, 1938,

and it was to be moved, at Pacific's expense, to its Renton Plant. Pacific was to operate its motor coach division for  $7\frac{1}{2}$  years from October 1, 1938, to employ the Newells for said period at a minimum salary of \$250 per month each, and, in addition thereto, to pay each of the Newells one-sixth of the profits of the business of the motor coach division earned during said term. Richard was to have charge of the production end and Robert was to manage the balance of the business. Pacific was to purchase, as needed, for cash at then market prices, all of Tricoach's materials inventory and to furnish free storage space if the inventory should be moved to its plant. A copy of the agreement is attached to the stipulation as Exhibit 7. Further reference to this document will be made and it will sometimes be referred to as the four-party agreement. [24]

At the same time that the four-party agreement was executed petitioner and the Newells entered into further agreements, which contemplated an arrangement whereby petitioner would lend to each of the Newells, without interest, \$4,187.83, to be used to purchase the machinery and equipment of Tricoach, which the Newells were to sublease to Pacific.

Separate agreements were executed by each of the Newells and petitioner, petitioner being designated in each as the second party. Each agreement recited *inter alia*:

In Consideration that the second party shall con-



sent to and enter into a certain contract between [Pacific, Tricoach et al, Exhibit 7 referred to above] \* \* \* and shall, on or before December 31, 1938, advance to first party the sum of Forty-one Hundred Eighty - seven 83/100 (\$4,187.83) Dollars, without interest, to be used by first party for the purpose of acquiring joint ownership of the machinery and equipment to be sub-leased \* \* \* [to Pacific], the first party hereby agrees to pay unto second party an amount equivalent to: one-third ( $1/3$ ) of all compensation, or damages in lieu thereof, not in excess of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), said first party shall receive or be entitled to receive from [Pacific] by reason of said contract as set forth in Exhibit "A" attached, [Exhibit 7] exclusive of the minimum salary of \$250.00 per month and rental income separately set forth in said contract. Payments to be made within three (3) days after first party shall receive an accounting and settlement of his adjusted bonus compensation from the Pacific Car and Foundry Co. for each respective calendar year or fractional period.

Each agreement further provided that, in the event any part or all of the machinery and equipment should be sold by the Newells, one-fourth of the net proceeds derived from the sale should be paid to petitioner and applied in liquidation of the \$4,187.83 loan and that one-half of all other payments made pursuant to the agreement would be applied in liquidation of the loan until it should



be paid in full. In the event that the first party [Richard in one contract and Robert in the other] should terminate his employment with Pacific [25] either voluntarily or by reason of death, the unpaid balance of the loan was to become immediately due and payable; however, first party, his heirs, assigns, or legal representatives was given the option of assigning to petitioner an undivided one-fourth interest in the machinery and equipment, together with the proportionate share of rental income to be subsequently earned, in full satisfaction of the unpaid balance, if any, then due on the loan. In the event that the named Newell should continue in the employ of Pacific for the full  $7\frac{1}{2}$  years, then petitioner agreed "to waive, cancel, and forgive any unpaid balance of the aforesaid loan in the amount of \$4,187.83." All of the contracts referred to above were dated August 3, 1938.

At a joint meeting of the stockholders and directors of Tricoach held on August 2, 1938, a resolution was adopted to suspend the manufacturing operations of the corporation on or about October 1, 1938; to gradually liquidate its affairs, to enter into the proposed agreement with Pacific (Exhibit 7) and to enter into a lease agreement with the Newells for lease of the corporation's manufacturing machinery and equipment with an option whereby they might purchase such machinery and equipment on or before December 31, 1938, for cash at its depreciated book value. (The option was exercised.)

The minutes of the meeting referred to above recite:

After lengthy discussion the following resolution was introduced and unanimously adopted:

Whereas; the headquarters building of the Tricoach corporation, at 705 Sixth Avenue North, Seattle, Washington, has been inadequate to properly house the corporation's manufacturing activities, it being necessary to rent additional space in other buildings in order to relieve the overcrowded conditions; insufficient space in which to place tools and equipment, work under construction, and for employees to perform their respective duties, has caused general inefficiency in direct labor production and an unwarranted increase in overhead expenses in ratio to productive man hours; making continued occupancy of the present quarters unprofitable; and [26]

Whereas; the present general business conditions, labor unrest, excessive taxation, governmental regulation and interference with manufacturing operations, etc., discourage the reestablishment of operations in another location; and

Whereas; Robert L. Newell, and Richard B. Newell, who have heretofore been in active management of the corporation's affairs, have an opportunity to enter the employ of the Pacific Car and Foundry Co., Motor Coach Division, and receive greater compensation than can be expected from continued operation of the Tricoach Corpor-

ation; and have arranged with their prospective employer to use all manufacturing machinery and equipment on a rental basis and to bear all cost of removing same from its present location, and to purchase whatever materials and supplies as may be on hand October 1, 1938, at current market prices when required, so that no unusual expenses or losses may be incurred by Tricoach Corporation by reason of suspending operations;

Now Therefore Be It Resolved; [substance shown above].

The concluding paragraph of the minutes is as follows:

Upon motion duly made and seconded, an agreement dated August 2, 1938, signed by all the stockholders of Tricoach Corporation, restricting the sale and transfer of shares of capital stock to persons other than the present stockholders and members of their respective families, was received and ordered filed as an appendix to these minutes.

In 1940 there was paid to petitioner by the Newells, under their respective agreements, the following amounts which were applied by petitioner as follows:

	From Robert L. Newell	From Richard B. Newell	Total
Payments received.....	\$2,603.65	\$2,603.65	\$5,207.30
Applied toward payment of their loans .....	1,301.83	1,301.82	2,603.65
	<hr/>	<hr/>	<hr/>
Treated as a community capital gain.....	\$1,301.82	\$1,301.83	\$2,603.65

On June 26, 1940, petitioner received \$25,500 and the two Newells each received \$12,250 from Tricoach as liquidating dividends. Each of the parties duly acknowledged receipt of the foregoing sums and directed that they be paid over to the Sales Co. and be charged to their respective accounts. That was done. Receipt was signed by petitioner reading as follows:

Received of Tricoach Corporation, the sum of \$25,500.00 Twenty-five thousand five hundred dollars; same being an amount equivalent to the par value of all the capital stock in said corporation owned by the undersigned. In event the Tricoach Corporation shall resume its business activities the undersigned hereby agrees to return the funds thus advanced; but, if business activities are not resumed, the funds thus advanced shall, upon dissolution, be applied in settlement of any liquidating dividends that may be declared.

The stock had cost petitioner \$25,500 plus \$1,001.42, his pro rata share of the 1935 deficit, and it therefore had a basis in his hands of \$26,501.42. Respondent, in determining the deficiencies, has allowed as a community deduction 50 percent of the long-term capital loss of \$1,001.42 and this item is not in controversy.

In 1941 there was paid to petitioner by the Newells, under their respective agreements, the following amounts, which were applied by petitioner as shown:



	Robert L. Newell	Richard B. Newell	Total
Payment received .....	\$9,286.00	\$9,286.00	\$18,572.00
Applied toward payment of balance of loans.....	2,886.00	2,886.01	5,772.01
	<hr/>	<hr/>	<hr/>
Treated as community cap- ital gain.....	\$6,400.00	\$6,399.99	\$12,799.99

In 1942 petitioner received final payments of \$610.34 from each of the Newells, the total received from both of them being, as shown by the schedules above, \$24,999.98. [28]

In each petitioner's 1940 income tax return there was reported as a long-term capital gain \$1,301.82, being his community one-half of the \$2,601.55 received from the two Newells in 1940 after the above-mentioned application on their indebtedness, and as such long-term capital gain there was taken into account, for tax purposes, only 50 percent thereof, or \$650.91.

Respondent, in each of his deficiency letters, held that said amount of \$1,301.83, received by each petitioner in 1940, was not a capital gain but was ordinary income taxable in full, thereby increasing each petitioner's taxable income for 1940 by \$650.91. If the amount was correctly reported by the petitioners then (because of uncontested adjustments made by respondent) the correct deficiency of each petitioner for 1940 would be \$2.57.

In each petitioner's 1941 income tax return there was reported as a long term capital gain \$6,400, being his community one-half of the \$12,800 received from the two Newells in 1941 after the above-mentioned application on the balance of their in-



debtedness, and as such long-term capital gain there was taken into account, for tax purposes, only 50 percent thereof, or \$3,200. Respondent held that said amount of \$6,400 was not a capital gain, but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1941 by \$3,200. If said amount was correctly reported as a long-term capital gain and only 50 percent thereof, or \$3,200, is to be taken into account for income tax purposes, then there would be no deficiency for 1941.

Based upon oral evidence adduced at the trial and admissions of the parties it is also found that Tricoach has never been dissolved; that petitioner received \$25,500 and nothing more from it upon its liquidation; that although it had no assets subsequent to the liquidation it was kept alive so that it could be availed of in the event the stockholders should desire to use it; that the [29] stockholders had in mind they might get back into the same business and conduct the corporation as they had formerly done although the possibility they might do so was considered remote; that in order to get the agreements with the Newells, under which the payments in issue were received it was necessary for petitioner to enter into the four-party agreement (Exhibit 7) and to advance, to Robert and Richard each, the sum of \$4,187.83 without interest; that the amounts were to be returned, if at all, out of compensation or damages in lieu thereof received by the Newells from Pacific; and that petitioner would not have entered into the four-party agreement

unless arrangements had been made under which he was to receive additional payments from the Newells.

Petitioner contends that the amounts received from the Newells over and above the repayment of their loans (\$2,603.65 in 1940 and \$12,800 in 1941) constituted long term capital gains to the community. His argument proceeds substantially as follows: The shares of Tricoach stock were capital assets. Tricoach was a successful corporation, as is indicated by its earnings. All that was distributed to the stockholders upon its liquidation was the par value of the stock, its earnings having previously been distributed as dividends and adjusted compensation. The dividends in complete liquidation are to be treated as a payment in exchange for the stock under section 115 (c) I. R. C. But the stock had a value in excess of par. Petitioner would not have consented to the corporation going out of business except for the consideration to be paid to him by the Newells. The payments by the Newells were therefore additional consideration to him for his consent to the liquidation and are to be added to the amounts received from the corporation as a liquidating dividend. [30]

The argument is ingenious but unsound. The statute relied upon states that amounts distributed in complete liquidation of a corporation "shall be treated as in full payment in exchange for the stock." It is doubtful if we are at liberty to construe it, as petitioner obviously wishes it to be construed, as meaning in part payment for the

stock. But passing this question we examine in more detail the arguments of the respective parties upon brief.

Petitioner cites but two cases: David A. DeLong, 43 B.T.A. 1185, and Margery K. Megargel, 3 T. C. 238. In the DeLong case a majority stockholder in a corporation, being desirous of effectuating a reorganization, paid cash to a minority stockholder to induce him to part with this stock and participate in the reorganization. He did so. It was held that the "crux of the business" was that the minority stockholder had disposed of his stock in the old company and received in exchange shares of stock in the new and \$14,000 in cash; that the total consideration should be treated as the sales price of the stock and the excess over cost as capital gain; that the portion of the gain attributable to the stock received was subject to the nonrecognition provisions of the statute and not subject to tax; and that only the portion attributable to the cash was then taxable. In the Megargel case the taxpayer had transferred stock, in 1933, upon representations which she later considered had been made fraudulently. In 1939 she instituted an action to annul the transaction and to recover the stock. The action was compromised, the taxpayer receiving cash, dismissing her action and executing a general release. It was held that inasmuch as the action had been primarily for the recovery of capital assets, the cash received in settlement partook of the nature of a capital recovery and the gain was taxable as a capital gain. [31]

The cited cases, in our judgment, furnish but slight aid to petitioner. He did not sell or dispose of his stock but still has it. The amount received in the liquidation has been treated as the statute contemplates. Passing the seeming inconsistency implicit in his failure to contest the allowance of a capital loss in connection with the liquidation of the corporation and thereby being in the position of claiming both a gain and a loss upon what he insists was an "exchange" of his stock, we examine in more detail his contention that the two types of payments—the liquidating distributions and the amounts received from the Newells—are to be added together for the purpose of computing his capital gain.

In his returns for the taxable years petitioner treated the amounts received from the Newells as "Tricoach Goodwill." We do not understand that he is now contending that the characterization is proper. It is therefore probably unnecessary to point out that good will "cannot be carved out of a business and sold independently of the going concern \* \* \*." *Dodge Bros. v. United States*, 118 Fed. (2d) 95. Cf. *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436. It is also difficult to see how a corporation, stripped of all of its assets and obligated by a valid contract to refrain for a period of 7½ years from engaging in the business for which it had been organized and equipped, had any good will of value, especially since its stockholders were bound by the same agreement and could not dispose of their stock in the corporation



except to the other stockholders or members of their respective families. Assuming that any good will existed, it was never transferred to, or disposed of by, petitioner.

Returning to petitioner's argument upon brief, he insists that he would not have consented to the corporation going out of business and liquidating unless he had been paid a substantial sum over and above the par value of his stock. He [32] so testified at the hearing and we have no reason to believe he was not telling the truth. But that does not prove that the amounts received from the Newells in the later years were received from the sale or exchange of his stock, even if it be assumed, contrary to the fact, that his stock had been disposed of. The form in which the parties chose to mold the transaction is clearly indicated by the documents which they signed. They are the best evidence of what they intended to do and of what they did. In consideration of petitioner consenting to the four-party contract, thereby effectively binding the corporation in which he owned the controlling interest and himself not to "own, operate, lease, conduct or have any interest in any automobile, bus or coach manufacturing or selling business in the States of Washington, Oregon, Idaho or Montana during the life of [the] agreement [71½ years] \* \* \* [and not] work for, aid or assist any person, firm, corporation or organization engaging in any such business \* \* \* in competition \* \* \*," and in consideration of petitioner advancing to each of the Newells \$4,187.83, they agreed to share the profits



which should be received from the Motor Coach Division of Pacific. The amounts in issue represented his share in the profits.

In our opinion respondent is correct in designating the payments made by the Newells to petitioner as the fruits of a joint venture. His suggestion that a portion may have been received from an agreement not to compete in business may be passed. In any event we think it is clear that they were not received "from the sale or exchange of a capital asset." The Commissioner therefore committed no error in including the amounts in the community income.

Decision will be entered in each case for the respondent. [33]

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The Tax Court of the United States  
Washington

Docket No. 4969

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, Promulgated May 28, 1945, it is Ordered and Decided: That there are deficiencies in income tax for the calendar year

except to the other stockholders or members of their respective families. Assuming that any good will existed, it was never transferred to, or disposed of by, petitioner.

Returning to petitioner's argument upon brief, he insists that he would not have consented to the corporation going out of business and liquidating unless he had been paid a substantial sum over and above the par value of his stock. He [32] so testified at the hearing and we have no reason to believe he was not telling the truth. But that does not prove that the amounts received from the Newells in the later years were received from the sale or exchange of his stock, even if it be assumed, contrary to the fact, that his stock had been disposed of. The form in which the parties chose to mold the transaction is clearly indicated by the documents which they signed. They are the best evidence of what they intended to do and of what they did. In consideration of petitioner consenting to the four-party contract, thereby effectively binding the corporation in which he owned the controlling interest and himself not to "own, operate, lease, conduct or have any interest in any automobile, bus or coach manufacturing or selling business in the States of Washington, Oregon, Idaho or Montana during the life of [the] agreement [71½ years] \* \* \* [and not] work for, aid or assist any person, firm, corporation or organization engaging in any such business \* \* \* in competition \* \* \*," and in consideration of petitioner advancing to each of the Newells \$4,187.83, they agreed to share the profits

which should be received from the Motor Coach Division of Pacific. The amounts in issue represented his share in the profits.

In our opinion respondent is correct in designating the payments made by the Newells to petitioner as the fruits of a joint venture. His suggestion that a portion may have been received from an agreement not to compete in business may be passed. In any event we think it is clear that they were not received "from the sale or exchange of a capital asset." The Commissioner therefore committed no error in including the amounts in the community income.

Decision will be entered in each case for the respondent. [33]

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The Tax Court of the United States

Washington

Docket No. 4969

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, Promulgated May 28, 1945, it is Ordered and Decided: That there are deficiencies in income tax for the calendar year

1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70.

[Seal] Entered May 28, 1945.

(Signed) ARTHUR J. MELLOTT,  
Judge. [34]

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[Title of Tax Court and Causes Nos. 4969, 4970.]

STIPULATION FOR CONSOLIDATION AND  
STIPULATION OF FACTS

The above parties, by their respective counsel, hereby stipulate that the above-entitled proceedings may be consolidated for hearing and decision, and they hereby stipulate the following facts in said consolidated proceeding, each party reserving the right to introduce additional testimony and evidence at the hearing.

1. George W. Yost and Juanita Yost are husband and wife, residing at Edmonds, Washington, and their separate income tax returns for the years involved, namely, for the [35] calendar years 1940 and 1941, were timely filed with the Collector of Internal Revenue for the District of Washington, at Tacoma, Washington. Their returns for each of said years, or a true copy thereof, will be introduced in evidence at the hearing of this proceeding.

2. The notice of deficiency to each petitioner, copy of which is attached to the respective petitions, was mailed to each petitioner on March 23, 1944,

and their respective petitions were filed herein on May 17, 1944.

3. The taxes in controversy are income taxes for the calendar years 1940 and 1941 and the deficiencies asserted are:

	1940	1941	Total
George W. Yost.....	75.44	1071.70	1147.14
Juanita Yost .....	75.44	1071.70	1147.14
	<hr/>	<hr/>	<hr/>
	150.88	2143.40	2294.28

In their petitions, the petitioners contend that the correct deficiencies are:

	1940	1941	Total
George W. Yost.....	2.57	None	2.57
Juanita Yost.....	2.57	None	2.57
	<hr/>	<hr/>	<hr/>
	5.14	None	5.14

4. For a number of years prior to January 28, 1935, Richard B. Newell was draftsman and chief engineer for [36] Heiser's Inc., manufacturers of bus and truck bodies at Seattle, Washington, Robert L. Newell had been engaged in the sale throughout the Pacific Northwest of bus and truck bodies manufactured by Wentworth & Irwin, of Portland, Oregon; and George W. Yost had been, and still is, engaged in the bus passenger transportation business in suburban Seattle as part owner and general manager of Suburban Transportation System.

5. For some time prior to January 28, 1935, the two Newells had discussed with Yost the formation of a new corporation to manufacture bus and truck bodies. As a result thereof the three of them, as incorporators, on January 28, 1935, organized for that purpose Tricoach Corporation, a Washington



corporation, with its principal office at Seattle, and thereafter and at all times herein mentioned the three of them owned all of the outstanding stock of the corporation and they were the only officers and directors of the corporation. A copy of the articles of incorporation is hereto attached, marked Exhibit "1," and made a part hereof.

6. Tricoach Corporation had an authorized capital of \$50,000.00, composed of 1,000 shares of common stock of the par value of \$50.00 each. In the articles of incorporation Yost subscribed for 150 shares and each of the Newells subscribed for 5 shares, which subscriptions were paid in cash at the first meeting of the incorporators, Yost paying \$7,500.00 out of community funds of himself and wife, Juanita Yost, and the Newells paying \$250.00 each. [37]

7. At the first meeting of directors, held on February 6, 1935, Robert L. Newell was elected president and sales manager, Richard B. Newell was elected vice president and chief engineer, and George W. Yost was elected secretary, which offices they continued to hold during the entire operations of the company. The salary of the two Newells was originally fixed at \$250.00 per month and, in addition thereto, the two Newells and Yost were each to receive adjusted compensation at the end of each calendar year of one-third of that amount of the net profits for such year as was in excess of an amount necessary to pay eight per cent dividends on all stock outstanding at the beginning of the year. A copy of the minutes of said meeting of Feb-

ruary 6, 1935, is hereto attached, marked Exhibit "2," and made a part hereof.

8. During the eleven months of 1935, Tricoach Corporation had net sales of \$82,805.39, and the results of its business for said year were as follows:

Net Income, exclusive of officers' salaries .....		\$ 4,404.82
Officers' salaries:		
Robert L. Newell		
11 months at \$250.00.....	\$2,750.00	
Richard B. Newell		
11 months at \$250.00.....	2,750.00	5,500.00
		<hr/>
Loss for year.....		(\$1,095.18)
Plus surplus adjustments.....		27.00
		<hr/>
Deficit for year.....		\$1,068.18

9. Up to December 16, 1936, the outstanding capital of the corporation had remained at \$8,000.00, the amount originally paid in. On that date the three stockholders made a contribution to capital, as paid-in surplus, in proportion to their stockholdings, of sufficient to wipe out the 1935 deficit of \$1,068.18 and then declared a dividend of \$80.00 per share, but not to exceed the net profits for the year. As a result thereof the following dividends were paid:

George W. Yost, on 150 shares.....	\$11,649.64
Robert L. Newell, on 5 shares.....	388.32
Richard B. Newell, on 5 shares.....	388.32
	<hr/>
	\$12,426.28

On said date subscriptions were accepted for the issuance of additional stock as follows:

George W. Yost, 348 shares.....	\$17,400.00
Robert L. Newell, 208 shares.....	10,400.00
Richard B. Newell, 208 shares.....	10,400.00

which subscriptions were duly paid by them and said stock issued, so that as of December 31, 1936, there were outstanding 924 shares of stock, or a total paid-in capital of \$46,200.00. A copy of the minutes of the directors' meeting of December 16, 1936, is hereto attached, marked Exhibit "3," and made a part hereof.

10. During 1936, Tricoach Corporation had net sales of \$231,503.81, and the results of its business for [39] said year were as follows:

Net income, exclusive of officers' salaries and adjusted compensation and Federal taxes.....		\$50,834.90
Officers' salaries and adjusted compensation:		
Robert L. Newell—		
Salary 6 mos at \$250.....	\$ 1,500.00	
Salary 6 mos. at \$300.....	1,800.00	
Adjusted compensation .....	10,140.95	
	<hr/>	
		13,440.95
Richard B. Newell		
(same as Robert L. Newell)....	13,440.95	
George W. Yost		
Adjusted compensation .....	10,140.95	37,022.85
	<hr/>	<hr/>
Net income before Income and Excess Profits Taxes.....		13,812.05
Income and Excess Profits Taxes..		1,426.77
		<hr/>
Net income after provision for taxes .....		12,385.28
		<hr/> <hr/>

The changes in its surplus account for said year were:

January 1, 1936—Deficit.....		(\$1,068.18)
December 16, 1936—Contributions by Stockholders to wipe out deficit:		
George W. Yost.....	\$1,001.42	
Robert L. Newell .....	33.38	
Richard B. Newell.....	33.38	1,068.18
		<hr/>
		0.00
Net income for year after provision for Federal taxes .....		\$12,385.28
Plus surplus adjustments.....		41.
		<hr/>
		12,426.28
December 16, 1936, cash dividend declared.....		12,426.28
		<hr/>
December 31, 1936, surplus or deficit.....		None

11. On December 2, 1937, subscriptions were accepted for the issuance of additional stock as follows:

George W. Yost, 12 shares.....	\$ 600.00
Robert L. Newell, 32 shares.....	1,600.00
Richard B. Newell, 32 shares.....	1,600.00

which subscriptions were duly paid by them and said stock issued, so that thereafter all the authorized stock of 1,000 shares was held: 510 shares by Yost and 245 shares by each of the Newells. A copy of the minutes of the directors' meeting of December 2, 1937, is hereto attached, marked Exhibit "4," and made a part hereof.

12. On December 27, 1937, there was declared a dividend of \$20.00 per share, but not to exceed the net profits for the year 1937, as a result of which the following dividends were paid:

George W. Yost, on 510 shares.....	\$ 7,968.08
Robert L. Newell, on 245 shares.....	3,827.81
Richard B. Newell, on 245 shares.....	3,827.81
	<hr/>
	\$15,623.70

A copy of the minutes of the directors' meeting of December 27, 1937, is hereto attached, marked Exhibit "5," and made a part hereof. [41]

13. During 1937, Tricoach Corporation had net sales of \$341,887.18 and the results of its business for said year were as follows:

Net income, exclusive of officers' salaries and adjusted compensation and Federal taxes .....		\$60,745.69
Officers' salaries and adjusted compensation:		
Robert L. Newell		
Salary .....	\$ 3,600	
Adjusted compensation ..	11,927.71	\$15,527.71
	<hr/>	
Richard B. Newell		
(Same as Robert Newell).....	15,527.71	
George W. Yost		
Adjusted compensation.....	11,927.71	42,983.13
	<hr/>	<hr/>
Net income before Federal taxes.....		17,762.56
Income and Excess Profits Taxes.....		2,142.86
		<hr/>
Net income after provision for taxes..		\$15,619.70
		<hr/> <hr/>

The changes in its surplus account for said years were:

January 1, 1937, surplus or deficit.....	None
Net income after taxes.....	\$15,619.70
Plus surplus adjustment.....	4.00
	<hr/>
	15,623.70
Cash Dividend, December 27, 1937.....	15,623.70
	<hr/>
December 31, 1937, surplus or deficit.....	None



14. As of the end of 1937, Yost, on his original investment of \$7,500.00 in the Tricoach Corporation, had received from the corporation in the two years 1936 and 1937, the following:

1936	Dividends .....	\$11,649.64
	Salary .....	10,140.95
1937	Dividends .....	7,968.08
	Salary .....	11,927.71
	Total .....	<u>\$41,686.38</u>

out of which he had made the following payments to the Tricoach Corporation:

1936	Pro rata of 1935 deficit.....	\$ 1,001.42
	Investment in 348 additional shares .....	17,400.00
1937	Investment in 12 additional shares .....	600.00
		<u>19,001.42</u>

Leaving him with a net amount of..... \$22,684.96

and he owned 510 fully paid up shares, or 51% of the stock of Tricoach Corporation.

15. As of November 1, 1937, the two Newells and Yost formed a partnership under the name of Tricoach Sales Company, to carry on the general business activities appertaining to the wholesale and retail distribution of motor vehicles and trading in commercial paper relating to such transactions. The Newells each contributed \$10,000.00 and Yost \$20,000.00, Yost having a 50% interest and each of the Newells a 25% interest in the partnership. Robert L. Newell was to devote most of his time [43] to the partnership as general manager in charge of all sales promotion activities of the firm and was to receive \$200.00 a month, which was to be con-

sidered an expense of the business before ascertaining the net profits of the firm's business. Richard B. Newell was to have charge of all matters relating to engineering services and construction, specifications and purchase contracts. George W. Yost was to approve all transactions relating to extended time payment, the purchase and sale of commercial paper, the borrowing of funds, and other similar financial matters. For the two months in 1937 the firm's net profits were \$526.00, of which amount Yost's share was \$263.00. A copy of said partnership agreement marked Exhibit "6" is hereto attached and made a part hereof.

16. In March, 1936, Heiser's, Inc., made an assignment for the benefit of creditors, and during said year all of its machinery and equipment was sold to Pacific Car & Foundry Co., which installed said machinery and equipment in its Renton plant and started a bus-body manufacturing plant in competition with Tricoach Corporation, but such venture resulted in a considerable loss to the Pacific Car & Foundry Co. in each of the years 1936 and 1937.

17. For several months throughout 1938, Pacific Car & Foundry Co. negotiated with the Newells and Yost for the purpose of accomplishing a merger or consolidation or some other method to eliminate the competition of Tricoach Corporation [44] and to secure the services of the two Newell brothers to manage the production and sales of the Motor Coach Division of Pacific Car & Foundry Co.

18. The arrangement finally worked out con-

templated the leasing by Tricoach Corporation of all its machinery and equipment to the Newells for ten years, together with an option to them to purchase, by December 31, 1938, at its depreciated book value, said machinery and equipment, and the Newells were to sublease to Pacific Car & Foundry Co. all of said Tricoach Corporation's machinery and equipment for 7½ years from October 1, 1938, and it was to be moved at Pacific's expense to its Renton plant. Pacific was to operate its Motor Coach Division for 7½ years from October 1, 1938, and to employ the Newells for said period at a minimum salary of \$250.00 per month each, and in addition thereto, to pay each of the Newells 1/6 of the profits of the business of the Motor Coach Division earned during said term. Richard B. Newell was to have charge of and manage the production end and Robert L. Newell was to manage the balance of the business of the Motor Coach Division. Pacific was to purchase, as needed, for cash, at then market prices, all of Tricoach Corporation's materials inventory and Pacific was to furnish free storage space therefor if said inventory was moved to its Renton Plant. A copy of said agreement entered into, as hereinafter stated, is [45] attached hereto as Exhibit "7" and made a part hereof.

19. At the same time the foregoing agreement, Exhibit "7," was negotiated between Pacific Car, the Newells, Tricoach Corporation and Yost, the Newells and Yost entered into further agreements which contemplated an arrangement whereby Yost

would loan to each of the Newells, without interest, \$4,187.83 to be used by each of them to purchase from Tricoach its machinery and equipment, which the Newells were to sublease to Pacific, and each of the Newells would pay to Yost an amount equivalent to one-third of the first \$37,500.00 each of the Newells should receive out of their respective shares of one-sixth of the prospective profits of the Motor Coach Division, to be paid to Yost within three days after the Newells had received their settlement of said profits. One-half of all such payments was to be applied by Yost in payment of the \$4,187.83 to be loaned by Yost to each of the Newells until such loans were paid in full. A copy of the agreement entered into, as hereinafter stated, by Yost with Robert L. Newell and also that with Richard B. Newell, are hereto attached as Exhibits "8" and "9" and made a part hereof.

20. At a joint meeting of the stockholders and directors of Tricoach Corporation held August 2, 1938, a resolution was adopted to suspend the manufacturing operations of the [46] corporation on or about October 1, 1938; to gradually liquidate its affairs; to enter into the proposed agreement with Pacific Car & Foundry Co.; and to enter into a lease-agreement with the Newells for lease of the corporation's manufacturing machinery and equipment, with an option whereby they might purchase such machinery and equipment on or before December 31, 1938, for cash, at its depreciated book value, which option the Newells exercised. A copy



of the minutes of said meeting of August 2, 1938, is hereto attached, marked Exhibit "10," and made a part hereof.

21. Thereafter, on August 3, 1938, a four-party agreement (Exhibit "7," hereto attached,) was duly entered into between Pacific Car & Foundry Co., as first party, the two Newells as second parties, Tricoach Corporation as third party, and George W. Yost as fourth party, to carry out the proposed arrangement.

22. On said August 3, 1938, George W. Yost entered into two separate, identical contracts (Exhibits "8" and "9," hereto attached,) one being with Robert L. Newell and the other being with Richard B. Newell, to evidence their respective agreements with Yost in regard to payment to Yost of a share of the respective profits to be received by each of the Newells out of the Motor Coach Division business.

23. In 1940, there was paid to Yost by the Newells, under their respective agreements, the following payments, [47] which were applied by Yost as follows:

	Robert L. Newell	Richard B. Newell	Total
Payments received by Yost..	\$2,603.65	\$2,603.65	\$5,207.30
Applied toward payment of their loans.....	1,301.83	1,301.82	2,603.65
	<hr/>	<hr/>	<hr/>
Treated by the Yosts as a community capital gain in their returns.....	1,301.82	1,301.83	2,603.65

24. On June 26, 1940, Yost received \$25,500.00



and the two Newells each received \$12,250.00 from the Tricoach Corporation as a liquidating dividend. Each of said parties duly acknowledged receipt of the foregoing sums and directed that the proceeds be paid over by the corporation to Tricoach Sales Company and be charged to their respective accounts. The receipts and such directions are set out in Exhibit "11," hereto attached and made a part hereof. Said stock had cost the Yosts its \$25,500.00 par value plus \$1,001.42 pro rata of the 1935 deficit, or a total of \$26,501.42, resulting in a community capital loss of \$1,001.42. Respondent in determining the deficiencies asserted herein has allowed as a community deduction to petitioners 50% of said long-term capital loss of \$1,001.42, or \$500.71, and allowed each of the petitioners a deductible loss of one-half thereof, or \$250.35. This item is not in controversy herein. [48]

25. In 1941, there was paid to Yost by the Newells, under their respective agreements, the following payments, which were applied by Yost as follows:

	Robert L. Newell	Richard B. Newell	Total
Payment received by Yost.....	\$9,286.00	\$9,286.00	\$18,572.00
Applied toward payment of balance of loans.....	2,886.00	2,886.01	5,772.01
Treated by the Yosts as a community capital gain in their returns.....	6,400.00	6,399.99	12,799.99

26. In 1942, Yost received final payments of \$610.34 from each of the Newells under their respective agreements. This made the total amount

received from each of the Newells \$12,499.99, or a total of \$24,999.98 from both of them.

27. In each petitioner's 1940 Income Tax Return there was reported as a long-term capital gain \$1,301.82, being his community one-half of the \$2,603.65 received from the two Newells in 1940 after the above-mentioned application on their indebtedness, and as such long-term capital gain there was taken into account, for tax purposes, only 50% thereof, or \$650.91.

28. Respondent in each of his Deficiency Letters held that said amount of \$1,301.83, received by each petitioner [49] in 1940, was not a capital gain but was ordinary income taxable in full, thereby increasing each petitioner's taxable income for 1940 by \$650.91.

29. That if said amount of \$1,301.82 was correctly reported as a long-term capital gain and only 50% thereof was to be taken into account for income tax purposes, then, due to certain other adjustments made by respondent in his Deficiency Letter, and to which no exception is taken, each petitioner claims his correct deficiency for 1940 would be only \$2.57.

30. In each petitioner's 1941 income tax return there was reported as a long-term capital gain \$6,400.00, being his community one-half of the \$12,800.00 received from the two Newells in 1941 after the above-mentioned application on the balance of their indebtedness, and as such long-term capital

gain there was taken into account, for tax purposes, only 50% thereof, or \$3,200.00.

31. Respondent, in each of his Deficiency Letters, held that said amount of \$6,400.00 was not a capital gain, but was ordinary income taxable in full, thereby increasing each petitioner's taxable income for 1941 by \$3,200.00.

32. That if said amount of \$6,400.00 was correctly [50] reported as a long-term capital gain and only 50% thereof, or \$3,200.00, was to be taken into account for income tax purposes, then there would be no deficiency for 1941.

ALFRED J. SCHWEPPE,  
MAURICE R. McMICKEN,  
Counsel for Petitioners.  
J. P. WENCHEL,  
W. H. P.,

Counsel, Bureau of Internal  
Revenue, Counsel for Re-  
spondent.

[Endorsed]: T.C.U.S. Filed Nov. 2, 1944. [51]

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## EXHIBIT NO. 1

(Copy)

### ARTICLES OF INCORPORATION OF TRICOACH CORPORATION

Approved Jan. 28, 1935. Ernest N. Hutchinson,  
Secretary of State, By Charles B. Reed, Assistant  
Secretary of State.

Know All Men By These Presents: That we, the undersigned, George W. Yost, resident of Edmonds, Snohomish County, Robert L. Newell, and Richard B. Newell of Seattle, King County, State of Washington being citizens of the United States, do hereby associate ourselves together as a corporation under and by virtue of the general incorporation laws of the State of Washington, and do hereby adopt the following

## ARTICLES OF INCORPORATION

### ARTICLE I.

The name of this corporation shall be Tricoach Corporation.

### ARTICLE II.

The objects for which this corporation is formed are and shall be:

1. To manufacture, buy, sell, hire and rent motor coach bodies, motor coaches, street cars, railroad coaches, automobiles, auto trucks, trailers, motorcycles, air craft, bicycles and all other vehicles and also all sorts of water craft.

2. To operate, conduct and engage in the motor coach transportation, motor express and freight transportation of any and all kinds.

3. To engage in, carry on or conduct, either as principal or agent, the business of a garage, auto repair shop, automobile service station or stations.

4. To own, operate, conduct and engage in the



motor coach transportation business, both intra-state and inter-state.

5. To engage in, carry on or conduct, either as principal or agent, the business of automobile dealer or automobile agency.

6. To buy and sell, at wholesale or retail, either as [53] principal or agent, motor coaches, automobiles, auto trucks, trailers, motor vehicles, bicycles, air craft and automobile supplies, equipment and accessories of every kind.

5. A. To manufacture, buy, sell, hire all kinds of water conveyances, whether for pleasure or otherwise.

6. A. To engage in the water ferry transportation business.

7. To purchase and otherwise acquire, lease, let, mortgage, sell and convey, and otherwise hold and dispose of, land and other real estate and interest in real estate of every kind.

8. To purchase or otherwise acquire, lease, mortgage, sell and otherwise deal in goods, wares, merchandise, and all kinds of personal property, and carry on a general merchandise business, either wholesale or retail.

9. To carry on a brokerage and commission business of any and every kind.

10. To charge and receive compensation for doing any of the things herein specified.

11. To construct, or otherwise acquire and hold



or maintain, and operate terminals, waiting stations, buildings, offices, repair shops, storage rooms, gas stations and other structures, together with all necessary appliances and equipment for the same necessary to the successful conduct of the business provided for in these articles.

12. To subscribe for, acquire by purchase or otherwise, and to own, hold, vote, sell, assign and transfer shares of the capital stock of any other corporation or corporations whether organized under the laws of this State or any other laws whatsoever.

13. To borrow money and to become indebted by the purchase or lease of any kind of property, real, personal or mixed, and to contract debts of any kind for carrying on any of the business of this corporation or acquiring any property desired therefor, and to issue notes, bonds, debentures and other evidence of [54] indebtedness, negotiable or otherwise, and to market or pledge all or any part of the property of this corporation to secure payment thereof.

14. To do all other acts and things necessary and convenient for accomplishing the objects hereinabove specified and to do any other act or acts, thing or things, that may be necessary or proper to successfully accomplish or promote the objects and purposes of this corporation and to do any and all things herein set forth to the same extent as natural persons could do in any part of the world.

## Article III.

The time of the existence of this corporation shall be fifty (50) years from and after the date of the execution of these Articles.

## Article IV.

The principal place of business of this corporation shall be at 703 6th Avenue North, city of Seattle, in King County, Washington.

## Article V.

The amount of capital stock of this corporation shall be Fifty Thousand dollars (\$50,000.00) of common stock which shall be divided into one thousand (1,000) shares of the par value of Fifty dollars (\$50.00) each.

## Article VI.

This corporation will start with a capital of Two Thousand Five Hundred dollars (\$2,500.00) which will be paid in cash.

## Article VII.

The number of directors of this corporation shall be three (3). The names of the first directors who shall manage the affairs of this corporation for six (6) months from the date of incorporation shall be George W. Yost, Robert L. Newell, and Richard B. Newell. The addresses of the Directors who are also [55] the Incorporators are: Geo. W. Yost, corner 5th & Alder Streets, Edmonds, Washington; Robert L. Newell, 438 39th North, Seattle, Wash-

ington; and Richard B. Newell, 3891 44th N. E., Seattle, Washington.

The Incorporators hereby subscribe for stock in this Corporation as follows:

Geo. W. Yost	150 shares
Robert L. Newell	5 shares
Richard B. Newell	5 shares

In Witness Whereof, we, the said George W. Yost, Robert L. Newell, and Richard B. Newell have hereunto set our hands and seals in triplicate at the city of Seattle, County of King, Washington, this 26th day of January, 1935.

GEO. W. YOST

ROBERT L. NEWELL

RICHARD B. NEWELL

State of Washington,  
County of King—ss.

This day, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared George W. Yost, Robert L. Newell, and Richard B. Newell, to me known to be the identical persons described in and who executed the foregoing Articles of Incorporation, in triplicate, and that they severally acknowledged to me, each for himself, that he signed and sealed and executed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal this 26th day of January, 1935.

(Seal)

L. P. ELLINGTON

Notary Public in and for the State of Washington,  
residing at Des Moines. [56]

## EXHIBIT NO. 2

(Copy)

### MINUTES OF FIRST MEETING OF DIRECTORS

The first meeting of the Board of Directors of Tricoach Corporation was held at 310 Central Terminal Bldg. in the City of Seattle, County of King and State of Wash. at 7:30 o'clock P. M., on the 6th day of Feb. A. D. 1935, in pursuance of the foregoing call and waiver of notice.

Robert L. Newell was chosen as temporary Chairman, and Geo. W. Yost was appointed temporary Secretary of the meeting.

On a roll call of the Directors by the Secretary the following were found to be present: Robert L. Newell, Richard B. Newell, Geo. W. Yost.

A quorum being present, on motion duly made and carried, the Board proceeded to the election of officers of the corporation to serve for the ensuing corporate year and until the election and taking of office of their successors.

The following officers were duly elected: President, Robert L. Newell; Vice-President, Richard B. Newell; Secretary, Geo. W. Yost; Treasurer, Richard B. Newell.



The Secretary-elect having been duly sworn, the permanent officers of the corporation took charge of the meeting.

On motion duly made and carried, the following were named a committee to draft by-laws and submit them to the Board during this meeting. Geo. W. Yost. [57]

The Committee for drafting by-laws now having reported and submitted a code of by-laws to the Board, the same was considered and discussed and, upon motion duly made and carried, was adopted, and ordered spread upon the records of this corporation immediately following the Minutes of this meeting.

A form of stock certificate having been presented for approval, the same was by motion adopted as the form of stock certificate of the corporation, and the Secretary was ordered to attach the same on page following by-laws of this record.

The following motions were also duly made and carried:

Moved, that the President be, and he hereby is, ordered to rent the premises at 703 6th Ave. N., Seattle, Wash. at an annual rental of not to exceed \$1950.00, said premises to be used for, and being hereby designated as the principal office of this corporation.

Moved, that the Treasurer be, and he hereby is, ordered to open a bank account in the name of the corporation with Pacific National Bank, Seattle, for the deposit of funds belonging to the corporation, such funds to be withdrawn only by check of



the corporation, signed by any two of its Officers.

Moved, that a seal, bearing the words Tricoach Corporation, Washington, Corporate Seal, 1935 and identified by an impression thereof on the margin of this page, be, and hereby is, adopted as the seal of this corporation.

(Impression of Seal.) [58]

Moved, that the Secretary be, and hereby is, instructed to purchase such record books and books of account, stationery and office supplies as may be necessary for the proper administering of the affairs of the corporation.

Moved, that the Secretary be, and hereby is, ordered to file the Articles of Incorporation with the King County Auditor for public record, and to do any and all things necessary in accordance with the law in such case made and provided.

Moved, that the Treasurer be, and hereby is, directed to pay all expenses properly incurred in the organization of the corporation.

By motion properly made and carried Robt. L. Newell was employed as Sales Manager at a salary of \$250.00 per month; and Richard B. Newell was employed as Chief Engineer at a salary of \$250.00 per month.

The following motion was properly carried:

In addition to salaries of Robt. L. Newell and Richard B. Newell, respectively, as above set forth; each officer of the Corporation, including Geo. W. Yost, Secretary, shall receive adjusted compensation at the end of each fiscal year in an amount equivalent to the net profits of the corporation for

such fiscal year which shall be in excess of an amount necessary to provide sufficient earned surplus from which cumulative dividends at the rate of 8% per annum may be paid upon the par value of all outstanding capital stock at the beginning of each year. Such [59] corporation net profits to be determined by the accrual method of accounting; all income taxes to be considered an expense of the year in which the income is earned.

On motion duly made and carried, the meeting was adjourned.

ROBERT L. NEWELL

President

GEO. W. YOST

Secretary [60]

EXHIBIT No. 3

(Copy)

## DIRECTORS SPECIAL MEETING

Dec. 16, 1936.

Meeting was held at office of Company at 7:30 P. M. with all Directors present.

Minutes of previous special meetings were approved as read.

By motion properly made and carried a cash dividend was authorized, payable immediately, in the sum of \$80.00 per share to all Stockholders of record as of Dec. 15, 1936; in event said dividend exceeds the net profits on Dec. 31, 1936, then said excess is to be refunded by all stockholders as soon as the amount thereof is ascertained.

By motion properly made and carried the following subscriptions for issuance of additional stock were accepted:

Geo. W. Yost	348 shares	\$17,400.00
Robt. L. Newell	208 "	10,400.00
Richard B. Newell	208 "	10,400.00

By motion properly made and carried the Secretary was authorized to sign copies of resolutions to the Peoples Bank & Trust Co. and the Pacific National Bank said resolutions to authorize the withdrawal of funds by checks signed by any one of the following: Geo. W. Yost, Robt. L. Newell, Richard B. Newell.

By motion properly made and carried the contributions set out in the attached authorization were accepted and ordered credited to Paid-in-Surplus. Said donations being as follows:

Geo. W. Yost	\$1001.42
Robt. L. Newell	33.38
Richard B. Newell	33.38

Meeting adjourned.

GEO. W. YOST

Secretary [61]

(Copy)

Tricoach Corporation

Builders of All Metal Coaches

6th N. and Roy, Seattle, Wash. Phone Gar. 8888

December 16, 1936.

We, the undersigned stockholders of the Tricoach

Corporation, for the purpose of eliminating deficit resulting from operations during the year of 1935, hereby authorize that our drawing account be charged with the amounts set opposite our respective names and the aggregate thereof credited to paid in surplus.

Geo. W. Yost	\$1,001.42
Richard B. Newell	\$33.38
Robert L. Newell	\$33.38 [62]

## EXHIBIT No. 4

(Copy)

RECORD OF MINUTES  
DIRECTORS' SPECIAL MEETING.

Dec. 2, 1937.

Meeting was held in private dining room at Wash. Athletic Club, 7:30 P. M. with all Directors present.

Minutes of previous meeting were approved as read.

By motion properly made and carried subscriptions for new stock were accepted and authorized issued as follows:

Geo. W. Yost	12 Shares	\$600.00
Robt. L. Newell	32 "	1600.00
Richard B. Newell	32 "	1600.00

Action pertaining to employee's bonuses and annual dividends was deferred to a later meeting to be held this month.

Meeting adjourned.

GEO. W. YOST

Secretary [63]

EXHIBIT No. 5

(Copy)

RECORD OF MINUTES  
DIRECTORS SPECIAL MEETING

Dec. 27, 1937.

Meeting was held in private dining room of Washington Athletic Club, 6:30 P. M. with all Directors present.

Minutes of previous meeting were approved as read.

By motion properly made and carried a cash dividend was authorized, payable immediately, in the sum of \$20.00 per share to all Stockholders of record as of Dec. 27, 1937; in event said dividend exceeds the net profits on Dec. 31, 1937, then said excess is to be refunded by all stockholders as soon as the amount thereof is ascertained.

Meeting adjourned.

GEORGE W. YOST

Secretary [64]

EXHIBIT No. 6

ARTICLES OF CO-PARTNERSHIP

This Agreement, entered into at Seattle, Washington, this 27th Day of December, 1937, by and



between Richard B. Newell, Robert L. Newell and George W. Yost, Witnesseth:

1. That the said parties have formed and do hereby form a co-partnership for the purposes of carrying on general business activities appertaining to the wholesale and retail distribution of motor vehicles (Automobiles, trucks, passenger coaches, bodies, chassis, etc.), and trading in commercial paper relating to such transactions; to be conducted under the firm name of—Tricoach Sales Company, with offices and principal place of business in the City of Seattle, County of King, State of Washington.

2. Said partnership commenced business on November 1, 1937, and shall continue, at will, from year to year, until dissolved.

3. The said parties have contributed the following sums of money, in cash, set opposite their respective names, which shall be and is the initial invested capital of the partnership to be used, laid out, and employed in the business of said firm for their mutual benefit:

(Name of Partner)	(%)	(Invested Capital)
Richard B. Newell	25%	\$10,000.00
Robert L. Newell	25%	10,000.00
George W. Yost	50%	20,000.00
Total invested capital .....		\$40,000.00

Any increase or decrease in the investment accounts of the parties shall be made in such amounts as will not change the ratio each respective party's investment bears to the total investment of all parties to this agreement.

4. Each party covenants with the other, that during the existence of said partnership, and for a period of one year after the sale of [65] partnership assets pursuant to the provisions of paragraph eleven (11), he will not engage in any competitive enterprise, for himself, as a member of another partnership, or as an officer or employee of another person, firm, or corporation, within the States of Washington, Oregon, and California, without the written consent of all other parties to this agreement. Permission is hereby granted for the respective parties to continue their activities with any and all firms and corporations with whom they are engaged on the date of this agreement.

5. The active management of the firm's business activities shall be shared equally by all partners; however, the particular duties of each partner are designated as follows:

(a) Richard B. Newell shall approve all construction specifications, purchase contracts, and have charge of all matters relating to engineering service.

(b) Robert L. Newell shall bear the title of "General Manager," and shall have charge of all sales promotion activities of the firm.

(c) George W. Yost shall approve all transactions relating to extended time payments, the purchase and sale of commercial paper, the borrowing of funds, and other similar financial matters.

Each partner shall devote sufficient time to the activities of the partnership as may be necessary to properly manage and conduct its affairs. It being

anticipated that Robert L. Newell will devote a greater portion of his time to the affairs of the partnership than shall be required of the other partners, it is hereby agreed that said Robert L. Newell shall receive a salary in the amount of \$200.00 per month, payable, semi-monthly if desired, out of partnership funds, which shall be taken into consideration as an expense of the business for the purpose of ascertaining net profits or losses at the close of each fiscal year. All partners shall be reimbursed for traveling expenses, use of private automobiles, etc., upon presentation of itemized expense voucher.

6. Each party covenants with the other parties, that all net [66] profits or losses resulting from operations of the said business shall be determined at the close of each calendar year and shall be shared in the following manner:

(a) Net losses: Richard B. Newell, 25%; Robert L. Newell, 25%; George W. Yost, 50%, and shall be charged to their respective investment accounts;

(b). Net profits, not in excess of 40% of invested capital as shown by partners' investment accounts on July 1 preceding: Richard B. Newell, 25%; Robert L. Newell, 25%; George W. Yost, 50%, and shall be credited to their respective drawing accounts;

(c) Net profits, in excess of 40% of invested capital as shown by partners' investment accounts on July 1 preceding: Richard B. Newell, One-

third; Robert L. Newell, One-third; George W. Yost, One-third, and shall be credited to their respective drawing accounts.

7. That good, true and complete books of account of said business shall be kept by double entry on the accrual basis, which shall contain a historical record of the business transactions entered into by said partnership; said books of account and supporting records shall be kept at the general office of the firm and shall at all times be available for examination and inspection by any partner or his duly authorized representative.

8. A meeting of the partners, or their duly authorized representatives, shall be held at the office of the firm or such other place as may be mutually agreed upon, immediately following the date upon which the net profits or losses for the preceding year have been ascertained; at which meeting action shall be taken for the distribution or other disposition of any profits that may have been earned during the preceding year. Undistributed profits and/or funds remaining in any partner's drawing account shall bear interest on the average monthly credit balance therein at the rate of six (6) per cent per annum, said interest to be added to each respective partner's drawing account and taken into consideration as an expense of the business [67] for the purpose of ascertaining net profits or losses at the close of each fiscal year.

9. All cash funds received by the partnership shall be deposited, in the name of the firm, in a bank or banks as may be designated from time to



time, and shall be subject to withdrawal by check signed by any one partner. Each party covenants with the other parties, that during the existence of said partnership; he will not, without the written consent of all other parties, withdraw funds from the business, or incur an obligation against the firm, for his personal use, in an amount which at the particular time shall exceed any credit balance remaining in his respective drawing account. Nothing contained in this paragraph is intended to modify or restrict the provisions of paragraph five (5) authorizing payment of salary allowance and the reimbursement of traveling expenses incurred by the respective partners.

10. In event of the death of any party to this agreement, the books of account shall be closed and the amount of the deceased partner's investment account shall be determined by transferring thereto his pro-rata share of undistributed profits or unapportioned losses, together with any balance remaining in his drawing account at the time of his death. At the option of the surviving partners they may acquire title and ownership of all the assets of the partnership business, including goodwill, upon payment by them of all partnership debts and the further payment to the estate of the deceased party an amount equivalent to the said investment account, all of which payments may be made out of partnership funds. In event the surviving parties shall not avail themselves of the option privilege described herein within sixty (60) days following the death of the deceased partner



or within such extended time as may be granted, they shall proceed, with the advice and cooperation of the deceased party's executor or administrator, to liquidate and wind up the affairs of the partnership.

11. In event any party may desire to terminate this agreement, dissolution of the partnership may be accomplished by mutual consent, [68] or in the following manner:—the party proposing the dissolution shall by written notice inform the other parties of his intention, and in such notice shall offer to purchase all the assets of the business (other than cash on hand and due from bank), including goodwill, for a specific monetary consideration, of which not less than 25% shall be payable in cash on the eleventh day following (Sundays and holidays excluded), and the balance payable in equal monthly installments during the ensuing twelve (12) months period together with interest on deferred payments at the rate of six (6) per cent per annum, the buyer to furnish adequate security to guaranty payment of the deferred installments and interest. The parties receiving the notice shall be deemed to have accepted the proposal unless within ten days thereafter (Sundays and holidays excluded) they shall elect, jointly or individually, to purchase the said assets at the same values and under the same terms proposed by the other party; and in the event of such election or acceptance, the buyer shall thereupon pay into the partnership treasury the initial cash payment set forth in the original proposal and shall execute and deliver into the hands of one of the other parties,

promissory notes, properly secured, covering the unpaid balance payable during the ensuing twelve months. The funds thus obtained from the sale of the partnership assets, together with cash on hand and due from bank, shall be disbursed in the following order:—

(a) In payment of partnership debts and expenses of dissolution;

(b) To the partners in equal amounts, but not in excess of any credit balance remaining in their respective drawing accounts; it being the intention that each party shall collect the full amount remaining to his credit in his respective drawing account before any payments are made in liquidation of the investment accounts:

(c) To: Richard B. Newell, 25%; Robert L. Newell, 25%; George W. Yost, 50%.

12. In event there shall be insufficient funds available to pay all partnership debts as they may mature, the party who voluntarily contributes the deficit or who may be compelled by court action to [69] make payments direct to creditors, shall receive credit in his drawing account for the amount of such payments, and shall be entitled to receive full and complete reimbursement of the funds thus advanced, together with interest at the rate of twelve (12) per cent per annum, from any funds subsequently received in the partnership treasury before payments in liquidation or otherwise are made to any other partner. Until reimbursed in full, the party or parties making such

advances shall have full charge of the partnership business affairs; and in event sufficient partnership funds are not forthcoming within six months after the date of the first unrecovered advancement of funds, said party or parties shall have a valid debt against the other party, or either of the other parties, for their pro-rata share of the total deficiency.

13. Any dispute or controversy arising between the partners, in respect to the dissolution and liquidation of said partnership, at the option of any party, may be submitted to arbitration under the rules of the American Arbitration Association then in effect, and each party covenants with the other parties to accept and abide by the award of such arbitration board.

In Witness Whereof, the said parties have hereunto subscribed their names, in triplicate, at Seattle, Washington, the day and year first above written.

ROBERT L. NEWELL,  
RICHARD B. NEWELL,  
GEO. W. YOST.

In presence of—

PAUL R. STROUT. [70]

#### EXHIBIT NO. 7

(Copy)

#### AGREEMENT

This Agreement, made this 3rd day of August, 1938, by and between Pacific Car and Foundry Company, a Washington corporation, hereinafter

## Exhibit No. 7—(Continued)

designated First Party; Robert L. Newell and Richard B. Newell, hereinafter designated Second Parties; Tricoach Corporation, a Washington corporation, hereinafter designated Third Party, and George Yost, hereinafter designated Fourth Party;

Witnesseth:

Whereas, First party, among other things, is engaged in the business of manufacturing and selling all types of passenger and commercial bodies for use in the transportation of passengers and freight upon all types of automobiles, trucks and trackless trolleys, under a division of its organization known as the Motor Coach Division; and

Whereas, second parties and fourth party own all of the capital stock and constitute the Board of Directors of the third party, which company is engaged in the same business as the Motor Coach Division of the first party and in competition with the first party; and

Whereas, first party desires to employ second parties to be managers of the Motor Coach Division of the first party and to lease the physical assets listed and set forth in the inventory attached hereto and marked Exhibit "A", upon terms, provisions and conditions hereinafter set forth; and

Whereas, second and fourth parties, by reason of their complete ownership and control of said third party, are in a position to discontinue the business operations of third party; and [71]



## Exhibit No. 7—(Continued)

Whereas, third party has leased to the second parties all of the physical assets of the third party listed and set forth in the inventory attached hereto and marked Exhibit "A"; now, therefore,

In Consideration of the premises and of the mutual promises and agreements herein contained, It Is Hereby Agreed by and between the parties hereto, as follows:

I. Second parties do hereby sub-lease to the first party, for a term of seven and one-half ( $7\frac{1}{2}$ ) years from the 1st day of October, 1938, all of the personal property listed and set forth in the inventory hereto attached and marked Exhibit "A" and now located principally at 703 Sixth Avenue North, in Seattle, Washington, at a monthly rental of One Hundred Dollars (\$100.00) per month, payable in advance on or before the 5th day of each and every month during said term. First party agrees to pay said rental for said term in the manner above set forth and agrees to keep said property in a good state of repair; agrees to carry fire insurance for the benefit of third party to the full value of said property; agrees to pay all taxes hereafter levied on said property during the term of this lease and agrees to pay three-twelfths ( $3/12$ ) of the personal property taxes on said property for the year 1938; agrees to move all of said property to first party's plant near Renton, Washington, and agrees to install such portions of said property as may be



**Exhibit No. 7—(Continued)**

needed, all without expense to second, third and fourth parties; and agrees not to thereafter move said property or assign this lease, or any interest therein, or sublet said property or any portion thereof without the written consent of second parties. This lease shall not be assignable by operation of law.

II. In consideration of second parties' entering into said lease, discontinuing the business of third party, and of other good and valuable consideration, first party does [72] hereby agree, subject to the provisions of Paragraphs XXI and XXII, to continue to operate its said Motor Coach Division for a period of seven and one-half ( $7\frac{1}{2}$ ) years from October 1, 1938, and does hereby employ the second parties to manage the said Motor Coach Division of the first party for said period of  $7\frac{1}{2}$  years from October 1, 1938, upon the following terms and conditions, to wit:

Each of said second parties will receive a minimum salary of Two Hundred Fifty Dollars (\$250.00) per month as long as he shall be employed by and act as manager of said Motor Coach Division. Richard B. Newell shall take charge of and manage the production of the Motor Coach Division and Robert L. Newell shall take charge of and manage the balance of the business of the Motor Coach Division. In addition to said minimum salary above mentioned, first party will pay to each of second parties one-sixth ( $1/6$ ) of the

## Exhibit No. 7—(Continued)

“profits” of the business of said Motor Coach Division earned during said term of years. Said “profits” for the purpose of this agreement shall be determined as follows:

(a) The business of said Motor Coach Division shall not be charged with any part of first party’s executive or managerial overhead or officers’ salaries, commissions or bonuses, regardless of the benefits which may be derived by said Motor Coach Division from the services of any such officers, executives or managers, but there shall be charged against the cost of operating the business of said Motor Coach Division the minimum salaries of the second parties, each in the sum of \$250.00 per month, and all other charges and expenses in connection therewith as are reasonable and allowable under regular and standard accounting practices, except as hereinafter provided. [73]

(b) Said Motor Coach Division shall not be charged with any tax now or hereafter created or levied by any Federal, State, County, municipal or other governmental authority upon or on account of net income and/or surpluses and/or undivided profits, but said Motor Coach Division shall be charged with any other tax or excise.

(c) During the life of this agreement, first party will supply said Motor Coach Division with ground and floor space, buildings, facilities and means of ingress and egress for conducting the business of

## Exhibit No. 7—(Continued)

said Motor Coach Division, as set forth upon Exhibit "B" attached hereto. Said Motor Coach Division shall be charged with a rental of..... Dollars (\$.....) per month for the use of said premises, buildings, facilities and means, and the same shall be maintained at all times in a good state of repair by the first party and no charge shall be made against the Motor Coach Division for repairs, insurance, taxes, upkeep or maintenance of said premises, except such repairs and maintenance as may be incurred by reason of the negligence of any employee in said Motor Coach Division.

In the event it shall become necessary to provide additional space for the business of said Motor Coach Division, the same shall be provided by the first party upon the following basis: In the event existing buildings are available and can be used advantageously, an additional rental shall be charged against said Motor Coach Division for the use of the same, upon the basis of ten per cent (10%) per year of the depreciated value of said buildings used, plus any cost of remodelling or alterations, as said depreciated value is carried upon the books of first party. For the purposes of determining the depreciated value of first [74] party's buildings, it is agreed that first party shall continue to depreciate the same at the same rate and upon the same valuations now being used. In the event it is necessary to erect additional build-

## Exhibit No. 7—(Continued)

ings, the same shall be erected by first party and an additional rental shall be charged against the Motor Coach Division, upon the basis of ten per cent (10%) per year upon the actual cost of such new construction and first party shall be under the same obligation to pay for repairs, insurance, taxes, upkeep and maintenance of said premises as above provided for buildings initially furnished to the Motor Coach Division. No ground rental shall be charged against the Motor Coach Division for any additional ground area needed for the erection of any additional buildings or the expansion of said Motor Coach Division but first party shall be entitled to charge to the Motor Coach Division the pro rata share for said additional ground area of any taxes imposed upon the real property of the first party by King County, Washington. In the event the buildings described in Exhibit "B" are destroyed or damaged by fire, first party will replace the same with other adequate buildings and if the cost of replacing the same shall exceed the sum of \$30,000.00 and shall also exceed the amount of the proceeds of any insurance on said buildings actually collected by first party as the result of their damage or destruction, a yearly rental in addition to the amount chargeable under this paragraph, of 10% of the amount of said excess cost shall be charged to the operations of the Motor Coach Division and first party agrees that it will not replace said buildings at such excess cost with-



## Exhibit No. 7—(Continued)

out the written consent of the second parties. In the event the said buildings are replaced at a cost which is less than the sum of \$30,000.00, the rental herein provided for shall be proportionately reduced. In the event the personal property described in Exhibit "A" is damaged or destroyed by fire so that the same is no longer useful in the business of the first party, the [75] rental herein provided to be paid shall be reduced in the proportion that the value of the property rendered useless bears to the value of the entire property leased.

(d) Said Motor Coach Division shall be charged with depreciation upon the machinery and equipment with which it commences to do business, except the portion thereof herein leased. For the purpose of determining the depreciated value of all such machinery, tools and equipment, it is agreed that first party shall continue to depreciate the same at the same rate and upon the same valuations now being used by first party. Said Motor Coach Division shall be charged also with all repairs, taxes and insurance upon all of said machinery and equipment with which it at any time does business, and with the rental of One Hundred Dollars (\$100.00) per month paid for the lease of machinery described on Exhibit "A". The Motor Coach Division shall not be charged with the expense of moving the personal property leased from second parties to Renton, Washington, but shall be



## Exhibit No. 7—(Continued)

charged with 5% per annum of the cost of installing the same.

(e) In the event additional machinery, tools and equipment are needed by said Motor Coach Division, the same shall be furnished by the first party upon the following basis: Said Motor Coach Division shall be charged with five per cent (5%) per annum of the actual cost of any such property plus cost of installation, all taxes and insurance, together with a reasonable depreciation allowance thereon, which shall not exceed a fair and reasonable allowance, based upon the estimated useful life of any such machinery or property, irrespective of any depreciation allowance allowed by taxing authorities or made by first party upon its books for its own bookkeeping purposes; provided, however, that the Motor Coach Division shall only be charged with five per cent (5%) per annum of the amount by which the said [76] cost of any such property, plus the depreciated value of all other machinery, tools and equipment of the Motor Coach Division owned by first party exceeds Thirty-Two Thousand Dollars (\$32,000.00).

(f) First party shall not be required to erect new buildings, to furnish machinery, tools and equipment in addition to what is on hand on October 1, 1938, unless the same is necessary to care for the growth of the business of manufacturing passenger-carrying motor vehicles or to replace

## Exhibit No. 7—(Continued)

buildings, machinery, tools and equipment on hand as of October 1, 1938, and in no event shall the Motor Coach Division make sale of its products for other than cash unless the terms of the sale shall have been approved, in advance, by the first party and second parties. Upon making a sale other than for cash, the first party and the second parties shall agree upon the proper percentage of the sale price which shall be charged against the profits of the Motor Coach Division as a reserve for repossession losses and upon the time for distributing said reserve.

(g) First party agrees to furnish to said Motor Coach Division, without interest charge, all moneys needed by said Motor Coach Division for labor, materials, inventory and any other operating need in the manufacture of passenger-carrying motor vehicles or in the growth of said business, except as otherwise herein provided.

(h) No notes, bonds, warrants, contracts or other evidence of indebtedness representing the unpaid purchase price of merchandise sold shall be disposed of at a discount by the first party without the written consent of second parties and none of said instruments shall be hypothecated by the first party without the written consent of the second parties, except that said consent shall not be required for hypothecation to regular commercial banks doing business in Seattle, Washington.

## Exhibit No. 7—(Continued)

(i) Said Motor Coach Division shall have the right to purchase water, light, telephone and power from first party at the same rate which first party pays for the same, such price in no event to exceed a fair and reasonable price, said Motor Coach Division to receive the full benefits of any price or rate obtained by first party on account of quantity purchases, long-term contracts, or any other advantageous arrangement under which first party may obtain water, light, telephone or power.

(j) It is understood that the first party maintains and will continue to maintain or make available, during the life of this agreement, an adequate heating plant, together with radiators, pipes, fans and vents, sufficient to heat the premises to be used by said Motor Coach Division. Said Motor Coach Division shall be furnished with heat at the actual cost thereof to first party; provided, however, that said Motor Coach Division may purchase heat elsewhere or install its own heating facilities if more advantageous to its operation.

(k) For the purpose of determining profits under this agreement, said Motor Coach Division shall not be charged with any losses or expenses incurred prior to the 1st day of October, 1938. Personal property taxes and prepaid insurance for the year 1938 upon all personal property used by said Motor Coach Division shall be pro rated, and said Motor Coach Division shall be charged with

## Exhibit No. 7—(Continued)

three-twelfths (3/12) of the same. No inventory losses during 1938 shall be deducted from profits for the last three months of 1938, computed in accordance with the terms of this agreement.

III. Said Motor Coach Division will have the right to purchase from first party any products manufactured or handled by first party, at first party's actual cost; and first party shall have the same right to purchase products of the [78] Motor Coach Division upon the same basis, provided that no other department of the first party will attempt to engage in the business conducted by the Motor Coach Division and the Motor Coach Division will not engage in any other business conducted by the first party. The Motor Coach Division may engage in the business of manufacturing and selling all types of passenger and commercial bodies for use in the transportation of passengers and freight upon all types of automobiles, trucks and trackless trolleys, and said Motor Coach Division may engage in the business of manufacturing and/or assembling complete transportation units for the above purposes, except railroad trucks or logging trailers, during the life of this agreement. First party, its officers executing this agreement, and each of them, shall not be permitted to directly or indirectly own, operate, lease, conduct or have any interest in, or directly or indirectly work for, aid or assist any person, firm, corporation or organization engaging in any business similar to the business of the Motor



## Exhibit No. 7—(Continued)

Coach Division, in the States of Washington, Oregon, Idaho, Montana and California while the second parties, or either of them, during the life of this agreement, remain in the employ of first party.

IV. The Motor Coach Division, until April 1, 1939, will furnish, at actual cost, guaranteed service upon all bodies sold by first party prior to October 1, 1938, and said cost will not be charged against any profits computed under this agreement, and it will, until April 1, 1939, furnish at actual cost guaranteed service upon all bodies sold by third party prior to October 1, 1938, and second parties will reimburse first party for cost of service on bodies so sold by third party. No reserve shall be created or held back in the determination or distribution of profits for service to be thereafter furnished to purchasers upon bodies or transportation units sold by said Motor Coach Division. [79]

V. As a part of the consideration of this agreement, first party agrees that said Motor Coach Division will purchase, for cash, from third party, at the then current market prices, f. o. b. Renton, Washington, all materials needed by said Motor Coach Division from time to time, until the material inventory of the Tricoach Corporation on hand at the time said Company discontinues doing business has been exhausted. It is further agreed that third party may move said inventory to first



## Exhibit No. 7—(Continued)

party's plant at Renton, Washington, and that first party will furnish suitable storage space for the same, without charge to second or third parties or to said Motor Coach Division. Third party will carry insurance on said property, at its own expense. Whenever practicable, materials from this inventory shall be used in preference to other materials purchased from the outside. Third party may, at its option, sell said materials to others.

VI. Each of second parties agrees to furnish himself with a serviceable automobile to be used by him in the business of said Motor Coach Division and in going to and from said place of business. Said Motor Coach Division shall pay for all repairs, tires and upkeep upon said automobiles, gasoline and oil, license, taxes, adequate fire, theft, property damage and public liability insurance, while said automobiles are being used in the business of said Motor Coach Division and for the reasonable personal use of said parties. No charges shall be made against said Motor Coach Division for depreciation or replacement of said automobiles.

VII. Second parties, and each of them, hereby agree to work in the employ of the first party in managing the operations of said Motor Coach Division for 7½ years from October 1, 1938, and each agrees to devote all of his employable time and attention, during usual business hours during the period of such employment, [80] to the mainte-

## Exhibit No. 7—(Continued)

nance, promotion and advancement of the business of said Motor Coach Division.

VIII. Each of said second parties hereby agrees that he will not, directly or indirectly, own, operate, lease, conduct or have any interest in any automobile, bus or coach body manufacturing or selling business in the States of Washington, Oregon, Idaho, Montana or California while he remains in the employ of the Motor Coach Division and agrees that he will not, during said period, directly or indirectly, work for, aid or assist any person, firm, corporation or organization engaging in any such business in said states, in competition with the business of said Motor Coach Division. Second parties may resell or assist third party in the resale of any units heretofore sold by the third party which it may become necessary for second parties or third party to repossess.

IX. It is understood and agreed that first party is not in any manner assuming or obligating itself to pay any of the debts, liabilities or obligations of second or third parties and that there is no partnership or joint venture relationship between the parties.

X. It is agreed that in the event that either Robert L. Newell or Richard B. Newell defaults in the performance of any covenant or agreement herein contained and such default shall continue for a period of thirty (30) days after notice, in

## Exhibit No. 7—(Continued)

writing, from first party to the person in default, the damages which would be suffered by the first party by reason of such breach would be uncertain and difficult of proof and that, therefore, the parties hereto agree that in said event the person in default shall waive his right to receive said one-sixth ( $1/6$ ) of any profits which are earned by the Motor Coach Division subsequent to the time of such [81] breach and shall pay first party the sum of Fifty Dollars (\$50.00), all as liquidated damages for said breach. Any breach of this agreement by either one of said second parties or by third or fourth parties shall affect only the right of the party breaching this agreement and shall not adversely affect the rights of any other party hereto. The breach by one or more of said persons shall only affect their right to receive profits earned by said Motor Coach Division subsequent to the time of any such breach and shall not entitle first party to a return of any profits already distributed to any of the parties and said breach of contract shall not prevent the person in default from engaging in a business in competition with the business of the Motor Coach Division. It is hereby agreed by the parties hereto that at the termination of this agreement, whether by breach of the first party or by breach of both of the second parties, or by expiration, said second parties shall have the right to manufacture the same products as are manufactured by the Motor Coach Division during the term of this agreement and sell the same, in competition with first party.

## Exhibit No. 7—(Continued)

If both of second parties default in the performance of any covenant or agreement herein contained, second parties shall, nevertheless, be entitled to terminate the lease of the personal property described in Exhibit "A" and resume the possession of said property.

XI. During the first five (5) years of the term of this contract, first party agrees to pay the premiums upon life insurance for said term of five (5) years on the life of each of said second parties, in the sum of Thirty-two Thousand Five Hundred Dollars (\$32,500.00) each; that said term insurance shall be in such form and payable to such persons as second parties shall determine. The death of either Robert L. Newell or Richard B. Newell shall terminate his right and right of his heirs, personal [82] representatives and assigns to receive any portion of the profits of the Motor Coach Division which shall be earned after his death. In the event that either Robert L. Newell or Richard H. Newell are prevented from carrying out the terms of this agreement by reason of any disability, the same shall not constitute a breach of this agreement but in said event the said party under disability shall forfeit his right to his minimum salary in the sum of \$250.00 per month, but shall not forfeit his right to his share of the profits of said Motor Coach Division, as herein provided. The premiums on the life insurance herein described shall be charged to the expense of operating the Motor Coach Division.



## Exhibit No. 7—(Continued)

XII. The profits of the Motor Coach Division which accrue after October 1, 1938, determined in the manner herein set forth, after the deduction of all prior years' losses, shall be distributed as follows: The profits for three months ending December 31, 1938, on March 1, 1939; the profits for each calendar year thereafter, less all prior years' losses, on or before March 1st of the next succeeding year. Distribution of all profits for the first three months of 1946, less losses not already deducted, shall be made on or before the 1st day of June, 1946; any profits which, according to the terms of this agreement, shall have accrued or shall have been distributed to the second parties shall not be diminished or affected by subsequent years' losses and second parties shall be entitled to receive and retain all profits which have accrued or which shall have been distributed irrespective of any losses that may be incurred subsequent to the accrual or the distribution of such profits.

XIII. It is agreed that in the event first party defaults in the performance of any covenant or agreement herein contained and such default shall continue for a period of thirty (30) days after notice in writing from the second parties to the [83] first party, the damages which would be suffered by the second parties by reason of such breach would be uncertain and difficult of proof; that therefore, the parties hereto agree that the first party will pay to the second parties, as liquidated



## Exhibit No. 7—(Continued)

damages for said breach, the sum of \$20,000.00, plus one-third of the profits earned by the Motor Coach Division for a period of twelve (12) months after the date of said breach. In said event the lease by the second parties to the first party of all of the machinery, tools and equipment listed on the inventory attached hereto and marked Exhibit "A" shall cease and determine and second parties shall be entitled to the immediate possession of the property so leased. It is agreed that in the event first party defaults in the performance of any covenant or agreement herein contained for the benefit of only one of second parties and such default shall continue for a period of thirty (30) days after notice in writing from said second party to first party, the damage which would be suffered by the said second party by reason of such breach would be uncertain and difficult of proof. That therefore the parties hereto agree that the first party will pay to the said second party as liquidated damages for said breach the sum of \$10,000.00, plus one-sixth ( $1/6$ ) of the profits earned by the Motor Coach Division for a period of twelve (12) months after the date of said breach. It is agreed that in the event of any such breach by first party, the second party or parties against whom the contract has been breached may immediately thereafter engage in business in competition with said Motor Coach Division and his or their actions in so doing shall not affect his or their right to receive the share of profits of said Motor Coach Division

## Exhibit No. 7—(Continued)

hereinabove provided for during the twelve (12) months following the date of any such breach.

XIV. First Party shall furnish to each of the second parties a monthly operating statement showing the profits and/or losses of the Motor Coach Division, computed in accordance with the terms of this agreement.

XV. Second parties, their agents, attorneys or accountants, [84] shall have complete access to the books and records of the first party relating to the operations of the Motor Coach Division at all times during regular business hours and shall be permitted to make copies of any entries upon said books or records.

XVI. All profits earned by the Motor Coach Division after October 1, 1938, on bodies or transportation units completed or sold after said date shall be distributed to the parties hereto in the same manner as if the construction of said bodies or transportation units had been begun after October 1, 1938. In consideration of the agreement in this paragraph contained, third party agrees that all orders obtained by it for bodies or transportation units subsequent to the date of this agreement shall be filled by the first party and all bodies or transportation units for which orders are obtained after the date of this agreement shall be constructed in the plant of the Motor Coach Division of first party.

XVII. In consideration of the promises of first

## Exhibit No. 7—(Continued)

party herein contained for the benefit of second, third and fourth parties, each of the third and fourth parties hereby agrees that he or it will not, directly or indirectly, own, operate, lease, conduct or have any interest in any automobile, bus or coach body manufacturing or selling business in the States of Washington, Oregon, Idaho or Montana during the life of this agreement, except that fourth party may retain his present interest in the Yost Auto Company, and agrees that he or it will not, during said period, directly or indirectly, work for, aid or assist any person, firm, corporation or organization engaging in any such business, except as above provided, in said states, in competition with the business of said Motor Coach Division.

XVIII. Third party has leased to second parties all of the property shown on Exhibit "A" attached hereto, for a period of seven and one-half ( $7\frac{1}{2}$ ) years from October 1, 1938, at a monthly rental of One Hundred Dollars (\$100.00) per month. If the second parties default in making any payment to the third party which may be due under the terms of the lease between the second and third parties, the third party agrees to notify first party, in writing, [85] of said default, and first party shall have a period of thirty (30) days after said notice to make good said default. Any sums expended by first party in making good the defaults of the second parties in their obligations under said lease shall be paid by the second parties to the first party, on demand.

## Exhibit No. 7—(Continued)

XIX. Second parties warrant that the first party, as long as it complies with the terms of this agreement, will not be disturbed in the peaceable possession and use of the personal property described in Exhibit "A" hereto attached during the term of the lease provided for herein by any person or persons lawfully claiming a right in said personal property.

XX. It is agreed by the parties hereto that honest errors in judgment made by second parties shall not constitute a breach of this agreement by said second parties.

XXI. It is understood and agreed that the parties hereto contemplate that the business of said Motor Coach Division shall be operated for a period of 7½ years from October 1, 1938. However, in the event for any reason the first party shall decide to discontinue the business of the Motor Coach Division, such a discontinuance of said business shall not constitute a breach of this agreement by first party. In the event first party does discontinue the business of said Motor Coach Division, first party shall give a written notice of thirty days to the second party of such discontinuance. First party and its officers executing this agreement shall not own, operate, lease, conduct or have any interest in or directly or indirectly work for, aid or assist any person, firm, corporation or organization engaging in any business similar too the business of the Motor Coach Division in the States of Wash-



## Exhibit No. 7—(Continued)

ington, Oregon, Idaho, Montana and California for a period of seven and one-half ( $7\frac{1}{2}$ ) years from the date said business is discontinued and any breach of the foregoing provision shall constitute a breach of this contract and entitle second parties to liquidated damages herein provided for. [86] If, within thirty (30) days from the date said business has been discontinued, first party receives an acceptable bona fide offer for any part of the equipment, machinery, tools, dies, patterns, inventory of work in progress of said Motor Coach Division, it shall first tender to second parties the right to purchase the property for which an offer has been received, at the same price and upon the same terms for which said offer has been received, and the second parties shall have a period of ten (10) days after said tender within which to purchase said property for which an offer has been received. Thereafter, and for a period of two (2) years, if first party receives an acceptable bona fide offer for any part of said property, it shall tender to second parties the right to purchase said property at the same price and upon the same terms included in said offer and second parties shall have a period of 48 hours, exclusive of Sundays and holidays, within which to purchase the same at said price and upon said terms.

XXII. It is understood and agreed that the parties hereto contemplate that the business of said Motor Coach Division shall be operated for a period of  $7\frac{1}{2}$  years from October 1, 1938. However, in the



## Exhibit No. 7—(Continued)

event for any reason the first party shall decide to sell the properties of said Motor Coach Division that a bona fide sale by first party at any time during the life of this agreement shall not constitute a breach hereof. In the event of any such sale, first party will pay to second parties one-third of the amount by which the proceeds of any such sale of said properties of the Motor Coach Division exceed the depreciated value of the physical properties sold, as the same are carried upon the books of first party. It is further agreed that in the event first party receives a bona fide offer for the properties of the Motor Coach Division which first party is willing to accept, it shall first tender to second parties the right to purchase said properties for the same price and upon the same terms contained in said offer, less the portion of the sale price which second parties would be entitled [87] to receive in case sale were made to a third party, and second parties shall have a period of ten (10) days after said tender within which to purchase said property for said price and upon said terms.

In Witness Whereof the second and fourth parties have hereunto set their hands, and the first and third parties have caused these presents to be executed by their respective officers thereunto duly authorized and their respective corporate seals to

## Exhibit No. 7—(Continued)

be hereunto affixed, this day and year first herein-  
above written.

[Seal]                   PACIFIC CAR AND FOUN-  
                              DRY COMPANY

(signed) By PAUL PIGOTT

President.

(signed) By H. N. CURD

Vice President.

(signed) By WM. PIGOTT, Jr.

Secretary-Treasurer.

First Party.

(signed)               ROBERT L. NEWELL

(signed)               RICHARD B. NEWELL

Second Parties.

[Seal]                   TRICOACH CORPORATION

(signed) By ROBERT L. NEWELL

President.

[Seal]

(signed) By GEO. W. YOST

Secretary.

Third Party.

(signed)               GEO. W. YOST

Fourth Party. [88]

## EXHIBIT NO. 8

(Copy)

This Agreement entered into at Seattle, Wash-  
ington, this 3rd day of August 1938, by and between  
Robert L. Newell, of Seattle, Washington, herein-

after designated first party, and George W. Yost, of Edmonds, Washington, hereinafter designated second party, Witnesseth:

In Consideration that the second party shall consent to and enter into a certain contract between the Pacific Car and Foundry Company, a corporation, the Tricoach Corporation, a corporation, et al, copy of which is attached here to and marked "Exhibit A," and shall, on or before December 31, 1933, advance to first party the sum of Forty-one Hundred Eighty-seven  $83/100$  (\$4,187.83) Dollars, without interest, to be used by first party for the purpose of acquiring joint ownership of the machinery and equipment to be sub-leased to the Pacific Car and Foundry Company as set forth in Exhibit "A" attached, the first party hereby agrees to pay unto second party an amount equivalent to;—

one-third ( $1/3$ ) of all compensation, or damages in lieu thereof, not in excess of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), said first party shall receive or be entitled to receive from the Pacific Car and Foundry Company by reason of said contract as set forth in Exhibit "A" attached, exclusive of the minimum salary of \$250.00 per month and rental income separately set forth in said contract.

Payments to be made within three (3) days after first party shall receive an accounting and settlement of his adjusted bonus compensation from the Pacific Car and Foundry Company for each respective calendar year or fractional period.

It is understood and agreed that the amount to be paid by first party to second party by reason of the aforesaid adjusted bonus compensation earned by first party subsequent to December 31, 1941, shall not exceed the difference (if any) between; (a) the amount theretofore paid or so much thereof not in excess of Seventy-five Hundred Dollars (\$7,500.00), and (b) Seventy-five Hundred Dollars (\$7,500.00).

In event any part or all of the machinery and equipment described in Exhibit "A" attached shall be sold by first party and his associate, one-fourth ( $\frac{1}{4}$ ) of the net proceeds derived from said sale shall be [89] thereupon paid to the second party and applied in liquidation of the aforesaid loan of \$4,187.83. It is understood and agreed that one-half ( $\frac{1}{2}$ ) of all other payments made by first party to second party pursuant to this agreement are to be applied in liquidation of said loan until it shall be paid in full.

In event first party shall terminate his employment with the Pacific Car and Foundry Company, Motor Coach Division, either voluntary or by reason of death, the unpaid balance, if any, of said loan shall become immediately due and payable; however, said first party, his heirs, assigns, or legal representatives, shall have the option to assign an undivided one-fourth ( $\frac{1}{4}$ ) interest in the machinery and equipment described in Exhibit "A" attached together with the proportionate share of rental income to be subsequently earned, to said second party, his heirs, assigns or legal representatives,



in full satisfaction of the unpaid balance then due on said loan. Said option shall become null and void if not exercised within thirty days after the termination of employment by first party or within such extended period as may be granted by second party.

In event said first party shall continue in the employ of the Pacific Car and Foundry Company, Motor Coach Division, for the full term of seven and one-half (7½) years from October 1, 1938, and shall fully perform all of the covenants set forth herein, the second party hereby agrees to waive, cancel, and forgive any unpaid balance of the aforesaid loan in the amount of \$4,187.83.

In Witness Whereof the parties have hereunto subscribed their names, in duplicate, at Seattle, Washington, this day and year first above written.

ROBERT L. NEWELL

First Party.

GEO. W. YOST

Second Party.

In Presence of:

PAUL R. STROUT

Exhibit "A" attached is Agreement, dated August 3, 1938, by and between Pacific Car and Foundry Company, a Washington corporation, First Party; Robert L. Newell and Richard B. Newell, Second Parties; Tricoach Corporation, a Washington corporation, Third Party; and George Yost, Fourth Party. [91]



## EXHIBIT NO. 9

(Copy)

This Agreement entered into at Seattle, Washington, this 3rd day of August 1938, by and between Richard B. Newell, of Seattle, Washington, hereinafter designated first party, and George W. Yost, of Edmonds, Washington, hereinafter designated second party, Witnesseth: 4

In Consideration that the second party shall consent to and enter into a certain contract between the Pacific Car and Foundry Company, a corporation, the Tricoach Corporation, a corporation, et al, copy of which is attached hereto and marked "Exhibit A," and shall, on before December 31, 1938, advance to first party the sum of Forty-one Hundred Eighty-seven 83/100 (\$4,187.83) Dollars, without interest, to be used by first party for the purpose of acquiring joint ownership of the machinery and equipment to be sub-leased to the Pacific Car and Foundry Company as set forth in Exhibit "A" attached, the first party hereby agrees to pay unto second party an amount equivalent to:—

one-third (1/3) of all compensation, or damages in lieu thereof, not in excess of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), said first party shall receive or be entitled to receive from the Pacific Car and Foundry Company by reason of said contract as set forth in Exhibit "A" attached, exclusive of the minimum salary of \$250.00 per month

and rental income separately set forth in said contract.

Payments to be made within three (3) days after first party shall receive an accounting and settlement of his adjusted bonus compensation from the Pacific Car and Foundry Company for each respective calendar year or fractional period.

It is understood and agreed that the amount to be paid by first party to second party by reason of the aforesaid adjusted bonus compensation earned by first party subsequent to December 31, 1941, shall not exceed the difference (if any) between; (a) the amount theretofore paid or so much thereof not in excess of Seventy-five Hundred Dollars (\$7,500.00), and (b) Seventy-five Hundred Dollars (\$7,500.00).

In event any part or all of the machinery and equipment described in Exhibit "A" attached shall be sold by first party and his associate, one-fourth ( $\frac{1}{4}$ ) of the net proceeds derived from said sale shall be [92] thereupon paid to the second party and applied in liquidation of the aforesaid loan of \$4,187.83. It is understood and agreed that one-half ( $\frac{1}{2}$ ) of all other payments made by first party to second party pursuant to this agreement are to be applied in liquidation of said loan until it shall be paid in full.

In event first party shall terminate his employment with the Pacific Car and Foundry Company, Motor Coach Division, either voluntary or by reason of death, the unpaid balance, if any, of said loan

shall become immediately due and payable; however, said first party, his heirs, assigns, or legal representatives, shall have the option to assign an undivided one-fourth ( $\frac{1}{4}$ ) interest in the machinery and equipment described in Exhibit "A" attached together with the proportionate share of rental income to be subsequently earned, to said second party, his heirs, assigns or legal representatives, in full satisfaction of the unpaid balance then due on said loan. Said option shall become null and void if not exercised within thirty days after the termination of employment by first party or within such extended period as may be granted by second party.

In event said first party shall continue in the employ of the Pacific Car and Foundry Company, Motor Coach Division, for the full term of seven and one-half ( $\frac{1}{2}$ ) years from October 1, 1938, and shall fully perform all of the covenants set forth herein, the second party hereby agrees to waive, cancel, and forgive any unpaid balance of the aforesaid loan in the amount of \$4,187.83.

In Witness Whereof the parties have hereunto subscribed their names, in duplicate, at Seattle, Washington, this day and year first above written.

RICHARD B. NEWELL

First Party.

GEO. W. YOST

Second Party.

In Presence of:

PAUL R. STROUT

Exhibit "A" attached is Agreement, dated August 3, 1938, by and between Pacific Car and Foundry Company, a Washington corporation, First Party; Robert L. Newell and Richard B. Newell, Second parties; Tricoach Corporation, a Washington corporation, Third Party; and George Yost, Fourth Party. [94]

EXHIBIT NO. 10

(Copy)

RECORD OF MINUTES, SPECIAL JOINT  
MEETING OF STOCKHOLDERS AND  
DIRECTORS

Pursuant to call of the president, the stockholders and directors of the Tricoach Corporation assembled in special joint session at the office of the corporation at 7:00 P. M., on August 2, 1938.

All stockholders and directors were present.

The president stated the meeting had been called for the purpose of taking formal action in regard to moving the corporation's place of business elsewhere or suspending operations; the matter having been under consideration for several weeks.

After lengthy discussion the following resolution was introduced and unanimously adopted:

"Whereas; the headquarters building of the Tricoach corporation, at 703 Sixth Avenue North, Seattle, Washington, has been inadequate to properly house the corporation's manufacturing activities, it being necessary to rent additional space in other buildings in order to relieve the overcrowded



conditions; insufficient space in which to place tools and equipment, work under construction, and for employees to perform their respective duties, has caused general inefficiency in direct labor production and an unwarranted increase in overhead expenses in ratio to productive man hours; making continued occupancy of the present quarters unprofitable; and

“Whereas; the present general business conditions, labor unrest, excessive taxation, governmental, regulation and interference with manufacturing operations, etc., discourage the reestablishment of operations in another location; and

“Whereas; Robert L. Newell, and Richard B. Newell, who have heretofore been in active management of the corporation's affairs, have an opportunity to enter the employ of the Pacific Car and Foundry Co., Motor Coach Division, and receive greater compensation than can be expected from continued operation of the Tricoach Corporation; and have arranged with their prospective employer to use all manufacturing machinery and equipment on a rental basis and to bear all cost of removing same from its present location, and to purchase whatever materials and supplies as may be on hand October 1, 1938, at current market prices when required. so that no unusual expenses or losses may be incurred by Tricoach Corporation by reason of suspending operations;

Now Therefore Be It Resolved; that the Tricoach Corporation suspend manufacturing operations on



or about October 1, 1938, and that the officers of the corporation be hereby authorized; [95]

(1). To gradually liquidate its affairs; and

(2). To enter into an agreement with the Pacific Car and Foundry Co., in consideration that they remove the manufacturing machinery and equipment from the premises where now in operation, and purchase materials and supplies at current market prices when required, to refrain from re-establishing manufacturing and selling operations in competition with their products in the states of Washington, Oregon, Montana, and Idaho, for a period not in excess of ten years; and

(3). To enter into a lease agreement with Richard B. Newell and Robert L. Newell, for use of the corporation's manufacturing machinery and equipment for not to exceed a ten year period, at a rental rate of \$100.00 per month; said lease to contain an option whereby the machinery and equipment may be purchased by Messrs: Richard B. Newell and Robert L. Newell for a cash consideration equivalent to its book value (cost minus accrued depreciation) if exercised on or before December 31, 1938, in which case any rental paid during the interim period shall be applied in payment of the purchase price of said machinery and equipment."

Upon motion duly made and seconded, an agreement dated August 2, 1938, signed by all the stockholders of Tricoach Corporation, restricting the sale and transfer of shares of capital stock to per-

sons other than the present stockholders and members of their respective families, was received and ordered filed as an appendix to these minutes.

Upon motion, meeting adjourned.

GEO. W. YOST,

Sec'y. [96]

(Copy)

### AGREEMENT

This Agreement entered into at Seattle, Washington, this 2 day of Aug. 1938, by and between Richard B. Newell, Robert L. Newell, and George W. Yost, Witnesseth:

Whereas, said parties to this agreement now own and control all of the capital stock of the Tricoach Corporation, a Washington corporation, and it is of mutual interest that the control of said capital stock does not transfer to any person or persons unfriendly to the remaining stockholders, which action might diminish the value of the capital stock retained by the present stockholders;

Now Therefore, in consideration of the mutual benefits to each party to this agreement, each party covenants with the other parties that he, or his heirs, assigns, and successors, will not sell or assign his capital stock in the Tricoach Corporation or any part thereof, to any person or persons other than his wife or children, or to any firm or corporation, without first giving notice in writing to all other stockholders; such notice to contain the name of the proposed assignee, the number of

shares to be transferred, the price per share, and the terms of sale, and shall stipulate that such other stockholders, individually or collectively, may, within ten days from the date such notice is received, Sundays and holidays excluded, purchase said shares at the same price and upon the same terms set forth in such notice.

In Witness Whereof, the names of the respective parties are subscribed hereunder, in triplicate, at Seattle, Washington, the day and year first above written.

GEO. W. YOST  
RICHARD B. NEWELL  
ROBERT L. NEWELL

In presence of:

PAUL R. STROUT.

(Copy)

Seattle, Washington, June 26, 1940.

Tricoach Corporation,  
Seattle, Washington.

Greetings:

Please pay to Tricoach Sales Co., the sum of Fifty Thousand Dollars (\$50,000.00) and charge the accounts of the undersigned in the following manner:

Richard B. Newell (24½%)	\$12,250.00
Robert L. Newell (24½%)	12,250.00
Geo. W. Yost (49%)	25,500.00

Respectfully,  
ROBERT L. NEWELL  
RICHARD B. NEWELL  
GEO. W. YOST

(Copy)

RECEIPT

Seattle, Wash., June 26, 1940.

Received of Tricoach Corporation, the sum of \$25,500.00 Twenty-five thousand five hundred dollars; same being an amount equivalent to the par value of all the capital stock in asid corporation owned by the undersigned. In event the Tricoach Corporation shall resume its business activities the undersigned hereby agrees to return the funds thus advanced; but, if business activities are not resumed, the funds thus advanced shall, upon dissolution, be applied in settlement of any liquidating dividends that may be declared.

GEO. W. YOST

Witness:

.....

Certificate number	Number of shares
.....	.....
.....	.....
.....	.....

(Copy)

RECEIPT

Seattle, Wash., June 26, 1940

Received of Tricoach Corporation, the sum of \$12,250.00 Twelve thousand two hundred fifty dollars; same being an amount equivalent to the par value of all the capital stock in said corporation owned by the undersigned. In event the Tricoach Corporation shall resume its business activities the undersigned hereby agrees to return the funds thus advanced; but, if business activities are not resumed, the funds thus advanced shall, upon dissolution, be applied in settlement of any liquidating dividends that may be declared.

ROBERT L. NEWELL

Witness:

.....

Certificate number	Number of shares
.....	.....
.....	.....
.....	.....



(Copy)

RECEIPT

Seattle, Wash., June 26, 1940

Received of Tricoach Corporation, the sum of \$12,250.00 Twelve thousand two hundred fifty dollars; same being an amount equivalent to the par value of all the capital stock in said corporation owned by the undersigned. In event the Tricoach Corporation shall resume its business activities the undersigned hereby agrees to return the funds thus advanced; but, if business activities are not resumed, the funds thus advanced shall, upon dissolution, be applied in settlement of any liquidating dividends that may be declared.

RICHARD B. NEWELL

Witness:

.....

Certificate number	Number of shares
.....	.....
.....	.....
.....	.....

Before the Tax Court of the United States

Docket Nos. 4969 and 4970.

In the Matter of:

GEORGE W. YOST AND JUANITA YOST,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Customs Court Room,  
Federal Office Building,  
Seattle, Washington,

November 2, 1944—9:30 a. m.

(Met pursuant to notice)

Before: Arthur J. Mellott, Judge.

Appearances:

Alfred J. Schweppe, Esq., and Maurice R. McMicken, Esq., 657 Colman Building, Seattle, Washington, appearing on behalf of the Petitioner.

W. H. Payne, Esq., appearing on behalf of the Commissioner of Internal Revenue, Respondent.

### PROCEEDINGS

The Court: We will call Dockets 4969 and 4970, George W. Yost and Juanita Yost.

You may state your appearances for the record?

Mr. Schweppe: Alfred J. Schweppe, Seattle, Washington, and Maurice McMicken, Seattle, Washington.

Mr. Payne: W. H. Payne for the Respondent.

The Court: You may state your case for the Petitioners.

## OPENING STATEMENT ON BEHALF OF THE PETITIONERS

By Mr. Schweppe.

Mr. Schweppe: May it please the Court, the facts in this case are virtually all stipulated. There will be some testimony that will be offered to prove certain facts. I have here a stipulation which consolidates these cases, because of the fact that they involve the identical problem, and also the stipulation of facts, with leave, however, to introduce the best evidence, whatever it is. I offer at this time the stipulation, and I have copies of the stipulation which have been signed by both counsel for the Respondent and for the Petitioners.

The Court: The stipulation may be filed, and will constitute a part of the record.

Mr. Schweppe: I also have here the tax returns for the years 1940 and 1941 for George W. Yost, the husband, which I offer at this time, it being agreed with counsel for [105] the Respondent that those tax returns, for the purpose of shortening the record, are identical with those of the wife, Mrs. Yost, so far as this record is concerned.

Mr. Payne: We agree to the stipulation, and that they may be offered.

The Court: The stipulations may be offered as joint exhibits A-1 and B-2.

(The documents referred to were marked and received as joint Exhibits A-1 and B-2.)

[Printer's Note]: Exhibits A-1 and B-2 set out in full at pages 152 to 160, inclusive.

Mr. Payne: Let the record show that they are the original returns from the Respondent's files, and are to be returned to the Respondent at the conclusion of the case.

The Court: The record may so show.

Mr. Payne: With liberty to furnish photostatic copies, if desired.

Mr. Schweppe: We do not wish to offer a great deal of evidence, in view of the stipulation; however, we wish to offer a small amount of testimony, and to that end, so that the Court may follow it, I will make a very brief statement.

The problem involved is whether or not certain money received by George W. Yost,—and I will endeavor to refer to him as the taxpayer,—in 1940 and 1941 constituted a long-term capital gain, so that only 50 per cent would be [106] taken account of in computing the income tax returns, or whether it is, as contended by the Respondent, ordinary income. The total amount involved is approximately \$2,300. In order to acquaint the Court with the situation out of which this problem arose, I will say merely that between the years 1935 and 1938 the taxpayer, George Yost, and two men known as the Newell brothers owned a corporation in the State of Washington known as the Tri-Coach Corporation. They were engaged in the manufacture

of auto busses, and that business under their management was a profitable one, as the stipulation of facts shows; Mr. Yost was the financier, and furnished capital to the Newell brothers who were experts in the field, one in auto bus construction and design, and the other in sales.

In 1938 there was another concern in Seattle also engaged in that business, the Pacific Car and Foundry Company. They had taken over the assets of a previously defunct concern engaged in that business and for a period of time their operations had not been very successful. In 1938,—during the early part of the year,—the Pacific Car and Foundry Company executives approached Mr. Yost and the Newell brothers with a view of determining whether or not an arrangement could not be made either for the consolidation of the Tri-Coach Motor business with their own, or for the purpose of taking it over. These negotiations lasted for [107] several months. Mr. Yost participated in the beginning, but after that the negotiations were participated in by the Newell brothers. I think it will be borne out by the testimony that that was almost always the case.

The Pacific Car and Foundry Company were interested in getting the services of the Newell brothers, one who was the expert in design and construction, and the other who was the expert in sales; they were not interested in getting the services of Mr. Yost. At that time, in August 1938, three contracts were executed, which are a part of the stipulation; the first contract, which is Exhibit



No. 7, was a four-party agreement between the Pacific Car and Foundry Company, as a party of the first part, the two Newell brothers as parties of the second part, the Tri-Coach Motor Corporation as a party of the third part, and George Yost, the taxpayer, as a party of the fourth part. Pursuant to the terms of that agreement, the transaction finally took place, having in mind that the Tri-Coach Corporation was going to go out of business. The Tri-Coach Corporation gave an option of all its physical property and assets to the Newell brothers who, in turn, leased these physical assets to the Pacific Car and Foundry Company. The agreement contemplated that the Newell brothers were to go over to the Pacific Car and Foundry Company, Motor Coach Division, for a period of seven and one-half years, and they were to receive a stipulated compensation, plus six per cent of the profits of the Motor Coach Division; and the Tri-Coach Corporation was to go out of business.

At the time this transaction was made in August 1938, the Tri-Coach Corporation was a very profitable business. The percentage of return on the capital investment was very large. They had made a large profit in 1936, 1937, and in the year 1938 up to the time this transaction took place.

In order to get Mr. Yost to step out of this profitable business and to get him to consent to it, which was an essential part of the agreement upon which the Pacific Car and Foundry Company insisted, Mr. Yost being a 51 per cent stockholder of the Tri-Coach Corporation whose assets were being

transferred under the arrangement I have recited, —in order to get his consent, the two Newell brothers each made a separate contract with Mr. Yost, which are Exhibits 8 and 9 attached to the stipulation, in which they agreed, in consideration of his consent to deal with the Pacific Car and Foundry Company, which contemplated the Tri-Coach Corporation going out of business, they would pay him a certain sum of money. Now, that sum of money was set up in Exhibits 8 and 9 as one-third of the amount, not exceeding, however, \$8,000 and a few hundred dollars in each case which they would receive out of their one-sixth share of the profits that they were to receive individually in excess of the \$250 a [109] month out of the profits of the Pacific Car and Foundry Company. In other words, at the time Mr. Yost agreed with the Newell brothers that, for making the agreement, he was to have additional compensation for his interest in the Tri-Coach Corporation other than that which he would get on liquidation of its assets.

This agreement was subsequently carried out. The Tri-Coach Corporation was liquidated, and liquidating dividends were paid to the stockholders. Mr. Yost, the 51 per cent stockholder, received \$25,500; that is, the Corporation actually liquidated its physical assets which approximated the value of the capital stock. And in addition to that, Mr. Yost, in the years 1940 and 1941 received from the two Newell brothers additional compensation which was payable to him under Exhibits 8 and 9.

When the taxpayer made his return for the year

in question he took the position, and the testimony will show, that the taxpayer himself prepared the returns; he took the position that the monies paid to him by the Newell brothers in the years 1940 and 1941 under the terms of Exhibits 8 and 9 were a capital gain, that it was compensation to him for his interest in the Tri-Coach Corporation over and above what he got in the liquidation of the physical assets, which was merely a return of his capital. Having in mind that the business was a profitable one, and had brought a large return on [110] the capital prior to the time of the making of this transaction with the Pacific Car and Foundry Company.

So the problem is whether or not the money received in 1940 and 1941 from the Newell brothers which, under the terms of Exhibits 8 and 9, was paid to Yost as compensation to cause him to step aside or step out of his profitable business in the Tri-Coach Corporation in order to make this transaction with the Pacific Car and Foundry Company,—whether or not that is a long-term capital gain, as the taxpayer construed it when he made his return, or whether it is an income taxable in full. The taxpayer construed it to be a capital gain to him, or, rather, a payment to him of additional compensation for his share in the corporate enterprise. That is, goodwill or going-concern value over and above what he actually got on liquidating the assets, which amounted to nothing more than a return of the capital.

Now, the facts, as I say, are virtually all stipu-

lated. There are one or two matters which we would like to have clarified by calling Mr. Yost and Mr. Newell and Mr. Strout, but their testimony will be very brief.

The Court: Do you desire to state your case, Mr. Payne?

### OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. Payne.

Mr. Payne: I have a very short statement, Your [111] Honor. We have entered into a rather elaborate stipulation of facts, and have a good many exhibits, agreements and contracts attached thereto which rather fully explain the relationship between these two parties and the related transactions as to which Mr. Schweppe has referred. Boil it down, it resolves itself into a simple question of whether the amounts of the net profits which the two Newell brothers were entitled to receive and did receive from the Pacific Car and Foundry Company under the contract with them relating to their employment is ordinary income to Mr. Yost or is taxable at capital gain rates.

Now, the two contracts referred to, one, the four-party contract between the Tri-Coach Corporation, the Pacific Car and Foundry Company, the two Newell brothers, and Mr. Yost, and the contract between Mr. Yost and the two Newell brothers, were apparently negotiated simultaneously and were executed at the same time. We believe those agreements themselves are rather clear with respect



to their relationships and with respect to the properties transferred. We do not agree with the conclusion which Mr. Schweppe draws in his opening statement as to the inferences to be drawn from the contract between Mr. Yost and the two Newell brothers that that was purely additional compensation or additional consideration to him for goodwill values which existed in the Tri-Coach Corporation. As a matter of fact, the evidence [112] shows that Mr. Yost did not sell or exchange any property to the Pacific Car and Foundry Company, and neither did he sell or exchange any properties to the Newell brothers. The first contract was a sale of property by the Tri-Coach Corporation to the Pacific Car and Foundry Company, pure and simple, so far as Mr. Yost is concerned, and so far as the Tri-Coach Corporation is concerned it did carry with it an employment contract with respect to the Newell brothers.

Now, the two Newell brothers entered into a lease agreement to take over certain of the physical assets from the Tri-Coach Corporation, with an option to purchase those assets. Their contract with Mr. Yost obviously contemplated two things, that Mr. Yost would go along with the first contract with respect to the arrangement between Tri-Coach Corporation and the Pacific Car and Foundry Company to sell its assets to the Pacific Car and Foundry Company, and thereby, in effect, terminated the business of the Tri-Coach Corporation, which ceased to further compete in that type of work, and Mr. Yost ceased to compete either indi-



vidually or as a part of the Tri-Coach Corporation, with the Pacific Car and Foundry Company's business which it thereafter contemplated conducting.

Now, Mr. Yost's agreement with the two Newell brothers also contemplated a further item, which we think is of importance, and is found in Exhibits 8 and 9, respectively. [113] There were separate contracts entered into with each of the two Newell brothers, which are identical in terms and amounts. That fact which we think is of importance is this, that Mr. Yost agreed that he would loan or advance,—the word “advance” is used in the agreement,—the sum of \$4,187.83, which was to be used by them to acquire certain machinery and equipment and facilities from the Tri-Coach Corporation which, as Mr. Schweppe has said, were, in turn, to be leased to the Pacific Car and Foundry Company by the two Newell brothers. Mr. Yost did advance that money, and our interpretation of that contract is apparently different than that of counsel for the Petitioners. We say that was, in effect, a separate venture on the part of Mr. Yost, that in the advancing of this money he was not to get it back at all events, but he was to get it back only if profits were returned, and a formula was set up in the contract by which that was to be accomplished. However, if they had continued to operate under the big contract for the period of seven and one-half years, which they were bound to do under the terms of the contract,—I am speaking of the Newell brothers,—and were unable to pay

the advances made by Mr. Yost back to him, then they were never to pay; and we say that was a part of a capital venture of Mr. Yost with the Newell brothers, and we say that the proceeds are in the nature of a joint venture income and are subject to normal rates and not as for the sale and exchange of capital assets. [114]

The Court: Call your first witness.

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Whereupon,

GEORGE W. YOST,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Schweppe:

Q. You are George W. Yost, the taxpayer in this case?      A. Yes.

Q. And Juanita Yost, the other taxpayer, is your wife?      A. That is correct.

Q. When, Mr. Yost, according to your best recollection, did the negotiations with the Pacific Car and Foundry Company commence?

A. In the early spring of 1938, to the best of my recollection.

Q. What part did you have in those negotiations?

A. I was present at one meeting in the White Building where the offices of the Pacific Car and

(Testimony of George W. Yost.)

Foundry Company are in Seattle, at which,—I don't know what Mr. Piggott's title is with the Company,—anyway he is the head of the Company,—was present, and the two Newell brothers, our accountant, Mr. Strout, and myself. It was sort of a tentative [115] conference looking forward to some manner of consolidating two companies. There were numerous propositions pro and con, but nothing resulted. We might say nothing was arrived at on any of those proposals at that meeting.

Q. At that conference was any statement made by you or by the Newell brothers as to the value of the stock in the Tri-Coach Corporation in the event that stock should be sold?

A. Yes. The par value of the stock being \$50,000, we considered at that time it was worth \$100,000.

Q. Did you so state in that conference?

A. Yes.

Q. From that time on, who was in charge of the negotiations with the Pacific Car and Foundry Company, so far as you were concerned?

A. Well, I didn't enter into the picture of any more negotiations until later on, and that is, I had nothing to do with the Pacific Car and Foundry Company, and the later negotiations were all between the Newell Brothers and the Pacific Car and Foundry Company. It seemed that the Pacific Car and Foundry Company were desirous of obtaining primarily the services of the two Newell brothers.

Q. Why was that?

(Testimony of George W. Yost.)

A. Because of their knowledge of the business, they being practical business men for the furtherance of motor coach construction and sales. Mr. Dick Newell being the [116] engineer and designer, and his brother, Robert Newell, being the salesman, having had many years of experience in that special line.

Q. Did the Pacific Car and Foundry Company make any effort to get you to come over to their organization?

A. No; everything was the reverse. They didn't have any use for me in their business.

Q. Coming now to the time approximately of the agreements of August 3, 1938. Prior to the execution of those agreements did you have any conferences with the Newell brothers relative to the liquidation of the Tri-Coach Corporation in connection with the contemplated transaction with the Pacific Car and Foundry Company?

A. Yes. The Newell brothers kept me advised of their negotiations with the Pacific Car and Foundry Company at all times after that first conference that I related, and then the whole thing as, so far as I was concerned,—the negotiations had this thought in mind, that the Newell brothers were to try to find out how we could get together on some sort of agreement which would permit them to take up their proposition with the Pacific Car and Foundry Company and to get me to step out of the picture.



(Testimony of George W. Yost.)

Q. Now, there are stipulated a number of instruments, including the three agreements, Exhibits 7, 8 and 9. Exhibits 7, 8 and 9 are all executed on August 3, 1938, Exhibit [117] 7 being a four-party agreement, and Exhibits 8 and 9 being identical instruments, but separate, private contracts, between you and the Newell Brothers. Were these instruments, according to your best recollection, executed on the same day?

A. Yes, that is correct, as of the same date. The two later ones may have been executed a few days later, but they were made as of the same date.

Q. Now, referring to Exhibits 7 and 8, with which I think you are thoroughly familiar,—Exhibits 8 and 9, I mean,—will you state the reason, on the basis of that discussion, that additional consideration or compensation set forth in those agreements was to be paid to you?

A. To put it simply, it was just compensation over and above my interest in the Tri-Coach Corporation to get me to step out of the business. It was just additional consideration, because the Company had been doing a very profitable business, and certainly I would not step out for just my equity in the assets of the Tri-Coach Corporation.

Q. What did your equity at that time amount to?

A. Well, it was 51 per cent of the stock. You mean at the time of the final liquidation,—it was merely the par value of the stock.

Q. Well, interjecting that parenthetically to



(Testimony of George W. Yost.)

complete the picture, what did you get on the liquidation of the Company [118]           A. \$25,500.

Q. What was that in relation to your actual investment?

A. That was the same as my actual investment.

Q. Would you have entered into Exhibits 8 and 9, executed on August 3, 1938, except for the additional consideration provided in those agreements?

A. Certainly not.

Q. Were you prepared to step out of the Tri-Coach Corporation merely on the basis of getting your original capital back at that time?

A. I was not.

Q. I note in examining Exhibit 7, which is the four-party agreement, that it was expressly provided that you might continue to operate the Yost Auto Company. What is the Yost Auto Company?

A. That is an automobile agency located in Edmonds, Washington, and has been there for many years, of which I am a substantial stockholder, selling Ford products primarily, and doing a general garage business.

Q. How long has that Company been in operation?           A. Oh, since 1913.

Q. I have just a couple of more questions. Exhibit 7, as I stated, is the four-party agreement. Would you [119] have signed Exhibit 7 if it had not been for the additional consideration provided to be paid to you in Exhibits 8 and 9?

A. I certainly would not.

Q. One final question: Your income tax returns

(Testimony of George W. Yost.)

for the years 1940 and 1941 have been admitted in evidence. Will you state for the record who prepared those returns? A. I prepared them.

Q. Individually? A. Yes.

Q. As a matter of fact, you have been preparing your own income tax returns for a good many years?

A. Ever since the income tax started.

Q. And therefore, what you said in the returns for 1940 and 1941 was your construction of that transaction at the time it was entered into?

A. That's correct.

Mr. Schweppe: You may cross examine.

### Cross Examination

By Mr. Payne:

Q. Mr. Yost, what is the present status of the Tri-Coach Corporation?

A. It is in existence in name only. There are no assets or liabilities, and there were a couple of reasons why we saw fit to continue to pay the state corporation license, which costs only \$15 per year, in order to keep [120] the Corporation alive in the event we would want to use it for some other purpose. I have done that for no other reason. It is cheaper than to create a new corporation, if we merely keep it alive. It was entirely liquidated.

Q. You had another organization, Mr. Yost, the Tri-Coach Sales Company, which you covered in the stipulation. Will you just state for the record what that organization consisted of?

(Testimony of George W. Yost.)

A. That is a partnership consisting of Newell brothers and myself, and it is still in existence. That was the sales organization. The Tri-Coach Corporation was the manufacturing company of these busses, and the Tri-Coach Sales Company, a partnership, was the selling organization.

Q. It was organized about when, the partnership?  
A. The partnership?

Mr. Schweppe: This stipulation shows 1937.

A. Yes, 1937.

Q. (By Mr. Payne—continuing): It was in existence at the time of the four-party agreement?

A. That is correct.

Q. And it is still in existence? A. Yes.

Q. And it has continued to operate throughout the years?

A. Just in a minor way; we are doing a little financing [121] with it; not any sales business any more.

Q. Now, when you received the \$25,500, as to which you testified on direct examination in connection with your stock in the Tri-Coach Corporation, what did you do with that money?

A. Well, my recollection is that that was transferred into the Sales Company,—most of it.

Q. And the two Newell brothers did the same with the proceeds that they received?

A. I believe that is right; we all did the same thing, yes.

Q. Mr. Yost, are you familiar with Exhibit 11, the stipulation of facts?

(Testimony of George W. Yost.)

A. Just in a general way; I read it over casually.

Q. In other words, you acknowledge receipt of that money and the turning of it over to the partnership, and that contemplated that eventually you might throw it back into the corporation, did it not?

A. Well, it could have been, I suppose, construed as such, yes.

Q. You had in mind all the time, did you not, that this seven and one-half year contract that the Pacific Car and Foundry Company had with the Newell brothers might be terminated, and you might get back in the same business and conduct the corporation as you formerly had done? [122]

A. That was a possibility; that was considered rather remote, but it was a provision for protection, by allowing the transaction to be consummated over a period of time rather than cash on the line.

Q. And you specifically contemplated when you turned the proceeds over to the partnership, and so specified in your paper turning the proceeds into the partnership?

A. We did not consider it as of such consequence, it was merely an easy way of clearing out the corporation and putting it into the partnership. That was the primary motive there.

Q. You stated that the Pacific Car and Foundry Company was interested in the Newell Brothers?

A. That's right.



(Testimony of George W. Yost.)

Q. Was that because of their technical knowledge and ability?

A. That is correct; not only their knowledge, but their long experience in this area, which gave them, you might say, an advantage in making sales to customers. They knew the customers in this area and had a very close contact with them.

Q. And they had been conducting those activities for the Tri-Coach Corporation in former years?

A. Yes.

Q. And you stated that the Pacific Car and Foundry [123] Company was not interested in obtaining your services because, as I understand it, you were representing the financial end of the management of the Tri-Coach Corporation?

A. That is correct.

Q. And they didn't need any assistance on that?

A. That is correct.

Q. At least, they thought they didn't?

A. That's right.

Q. Now, Mr. Yost, you controlled the Tri-Coach Corporation, as I understand it?

A. That's right.

Q. And you could have, therefore, controlled what the Corporation did with respect to its properties, could you not?

A. That's right.

Q. You did not control the two Newell Brothers personally?

A. That's right.

Q. They could have done what they pleased with respect to their own services, could they not?

A. Yes.



(Testimony of George W. Yost.)

Q. And you were confronted with the possibility of losing their services to the Tri-Coach Corporation, were you not?

A. No, I would not, because we had absolute confidence [124] between the three of us at all times, and still have and to exemplify that, I might say, that our bank account is such that either one of us can draw on it without the knowledge of the other; we have just full confidence in the others, each of us. They had the confidence in me to the extent that they knew, and still know I would not do anything that would be injurious to them, and neither would they do anything that would injure my interests.

Q. But the Tri-Coach Corporation could not tie up their services? A. That is correct.

Q. Now, Mr. Yost, coming back to Exhibits 8 and 9, as to which you testified. There were also other considerations to that contract, were there not? A. I don't recall.

Q. Mr. Yost, you testified you would not have executed these agreements, 8 and 9,—strike that. You testified that you would not have executed the four-party agreement if you had not also obtained the agreements with the Newell brothers. Exhibits 8 and 9?

A. That is correct.

Q. And in order to get the agreements with the Newell brothers, 8 and 9, you also had to do something further, did you not?

A. I really don't know what you are driving at.

Q. You had to advance some money?

(Testimony of George W. Yost.)

A. That was the means of disposing of the machinery. That was just as incidental transaction to the whole thing.

Q. What do you mean, disposing of the machinery?

A. To get the Tri-Coach Corporation, to get rid of it, to absolutely liquidate the Tri-Coach Corporation.

Q. The Newell brothers did not have the capital to acquire the property, that is, to buy the machinery, and you supplied a part of the money to do so?

A. That's right.

Q. And they used that money to obtain the machinery and equipment from Tri-Coach.

A. That's correct.

Mr. Payne: That's all.

### Redirect Examination

By Mr. Schweppe:

Q. Just one other question. When the Tri-Coach Corporation was originally organized, who put up the great bulk of the money?

A. I put up \$7,500, and the Newell brothers put up \$250 each. That gives you the complete picture there at the start.

Mr. Schweppe: That's all.

Mr. Payne: Nothing further.

The Court: You may be excused. [126]

(Witness excused.)

Mr. Schweppe: Mr. Newell.

Whereupon,

ROBERT L. NEWELL,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Will you give us your full name?

A. Robert L. Newell.

Q. You are one of the Newell brothers referred to in the certain agreement dated August 3, 1938, to which the Pacific Car and Foundry Company, Robert L. Newell, Richard B. Newell, the Tri-Coach Corporation, and George Yost were parties?

A. Yes.

Q. And you are also the Robert L. Newell, on the same date, who made a contract with George Yost, the taxpayer here?

A. Yes.

Q. Which agreement is also one of the exhibits. Will you state, Mr. Newell, why you and your brother executed these two agreements, Exhibits 8 and 9, with Mr. George Yost? [127]

Mr. Payne: Now, if Your Honor please,—

Mr. Schweppe: Well, I think that is an improper way to state the question; I agree with you.

Q. (By Mr. Schweppe, continuing): Will you state what the discussions were with Mr. Yost, with yourself and your brother, as respects the consideration to be paid to him at the time you people

(Testimony of Robert L. Newell.)

entered into the deal with the Pacific Car and Foundry Company?

A. Well, we had arrived at a suitable agreement, we thought, with the Pacific Car and Foundry Company, and it was necessary for us to clear ourselves, you might say, with Mr. Yost. So, after we had arrived at this agreement with the Pacific Car and Foundry Company, we had a meeting with Mr. Yost and Mr. Strout, and tried to estimate the value of the Tri-Coach Corporation, the Sales Company, and then take into account the value so far as the physical assets and value of the going business was concerned. And our figures, were arrived at; we thought Mr. Yost was very fair to us all the way through, and we put down \$50,000 for the physical value of the Company, and put \$5,000 down for the value of the going business, and with that thought in mind we arrived at a figure to give him the difference between the two of us, \$25,000, as he owned 50 per cent of the Company,—the \$25,000 being the value of the going business.

Mr. Payne: Well, if Your Honor please, I have [128] been rather lenient. I was willing to have him tell the background, but this answer is entirely outside of the scope of the inquiry. It is not competent as to the value of the intangibles.

The Court: Is the testimony being relied upon to prove the value of the intangibles?

Mr. Schweppe: Not to prove specifically the value, but to prove that the intangibles did have value, yes.



(Testimony of Robert L. Newell.)

The Court: Well, I will sustain the objection at this time.

Mr. Payne: I move that that part of the answer with respect to value be stricken as not responsive to the question. The question was, what was his conversation with Mr. Yost, and I move to strike the value part of the answer as not responsive.

The Court: Well, we will let it stand, not as any proof of value, but as a mere statement of what the conversation was.

Q. (By Mr. Schweppe, continuing): Will you continue with the conversation that took place between you and Mr. Yost, leading up to the execution of the agreements which are Exhibits 8 and 9 in this case?

A. Well, Mr. Yost agreed with that amount that we fixed as the value for the business, and we entered into an agreement to pay him that. That is all there is to it. [129]

Q. Did Mr. Yost make any statement in your presence as to whether or not he would sign the agreement with the Pacific Car and Foundry Company unless he got additional consideration?

Mr. Payne: I object to that. I don't think it's material. The contracts were executed. I don't think that is material.

The Court: The objection is over-ruled.

Mr. Payne: Note an exception.

The Court: Exception noted.

A. Mr. Yost did not, because he never had to; he knew we would never make an agreement with



(Testimony of Robert L. Newell.)

the Pacific Car and Foundry Company without his consent.

Q. (By Mr. Scheppe, continuing): I will ask you this question: Was there ever any conversation between your brother and yourself and Mr. Yost at the time this negotiation took place, between the three of you, suggesting or intimating any consideration to him for staying out of business as against the Pacific Car and Foundry Company?      A. No.

Mr. Payne: I'll object to that, if Your Honor please. The agreements also cover that specifically. In the four-party agreement, which is before Your Honor, Mr. Yost did agree to stay out of business personally. I object to that testimony. [130]

The Court: The question has been answered. We will let it stand.

Mr. Payne: Exception.

Mr. Scheppe: That is all.

### Cross-Examination

By Mr. Payne:

Q. You testified on direct, Mr. Yost, that before entering into any contract with Pacific Car and Foundry Company it was necessary to clear yourself with Mr. Yost. What do you mean by that?

A. I mean that they,—rather, that we would have to get his agreement that we could do that; we had entered into business with Mr. Yost, and we were going to stay there until the agreement

(Testimony of Robert L. Newell.)

was made, or until he agreed that we could accept some other proposal.

Q. You and your brother owned 49 per cent of the stock of the Tri-Coach Corporation, did you not? A. That's right.

Q. You had no contract to give your personal services to that corporation, did you?

A. Only our word of honor.

Q. After your various negotiations with the Pacific Car and Foundry Company, and also with Mr. Yost, you finally reduced your understandings to writing, did you not? A. Yes. [131]

Q. And they are reflected in the agreements which are introduced in evidence?

A. Yes, I believe they are.

Mr. Payne: That is all.

Mr. Schweppe: That is all, Mr. Newell. Thank you very much for coming.

(Witness excused.)

Mr. Schweppe: Mr. Strout.

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Whereupon,

PAUL R. STROUT,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Paul R. Strout.)

Direct Examination

By Mr. Schweppe:

Q. Will you state your name for the record?

A. Paul R. Strout.

Q. Will you state your business or profession?

A. I am a certified public accountant.

Q. Are you acquainted with Mr. Yost and the Newell brothers?

A. Yes.

Q. Will you state what connection you had in the year 1938 with the taxpayer, Mr. Yost, the Newell brothers, and the Tri-Coach Corporation?

A. I was employed by them as their accountant.

Q. And did you participate in any of the discussions or negotiations leading up to the transaction which is incorporated in certain agreements which are attached to this stipulation as exhibits 8 and 9?

A. I did.

Q. What was the first conference in which you participated?

A. It was a meeting held in the offices of the Pacific Car and Foundry Company in the White Building, Seattle, Washington, during the early summer or late spring of 1938.

Q. Do you recollect what negotiations took place there?

A. I had prepared three or four alternate plans for a merging and consolidating of the two companies, and submitted them for consideration.

Q. In the course of that conference, were any

(Testimony of Paul R. Strout.)

values stated by Mr. Yost or the Newell Brothers as to the stock in the Tri-Coach Corporation?

A. Yes.

Q. State what those values were that were then stated.

Mr. Payne: I object, Your Honor. I don't think the statement of the value is relevant.

The Court: Is the value in issue in this case, [133] gentlemen?

Mr. Schweppe: The value itself is not in issue, that is, the value in specific dollars and cents. It is the fact that there was a value placed on the stock of this Corporation over and above its mere liquidating value. That is the point I am trying to show.

The Court: The objection is overruled.

Mr. Payne: Note an exception.

The Court: An exception may be noted.

Q. (By Mr. Schweppe, continuing): Will you state what value was mentioned in that conference?

A. \$100,000.

Q. What was the authorized capital of the Tri-Coach Corporation at that time, if you know?

A. \$50,000.

Q. From your own knowledge, were the operations of the Tri-Coach Corporation at the time of these negotiations profitable or otherwise?

A. They were very profitable.

Q. Did you have occasion during the course of these negotiations to make any investigation of the operations of the Motor Coach Division of the Pacific Car and Foundry Company?

(Testimony of Paul R. Strout.)

A. I did.

Q. And what did that investigation show?

A. It showed that they had suffered substantial losses during two preceding years in which they had operated it.

Q. Do you know of your own knowledge from statements made in your presence whether the executives of the Pacific Car and Foundry Company were especially desirous of obtaining the services of the Newell brothers?

Mr. Payne: I'll object to that as incompetent.

Mr. Schweppe: I will withdraw that question. It is covered by the instruments, anyway; it is a matter of necessary inference.

Q. (By Mr. Schweppe, continuing): You were familiar with the winding up of the affairs of the Tri-Coach Corporation? A. Yes.

Q. When the affairs of that Company were ultimately liquidated, how much was repaid to the stockholders, if you know?

A. The full par value of the stock was distributed,—assets equivalent to the full par value were distributed to the stockholders.

Q. Approximately \$50,000?

A. It was \$50,000.

Q. Now, if you know, who prepared the agreements between the Newell brothers and Mr. Yost, which are attached to the stipulation of facts as Exhibits 8 and 9? [135]

A. I prepared those documents.

Q. Were you present at the conferences be-



(Testimony of Paul R. Strout.)

tween those three persons, which led up to the preparation of that agreement?

A. I attended the meeting, yes.

Q. Will you state what the,—when was that conference, incidentally, if you remember?

A. August 2, 1938.

Q. That was the day then before the execution of all three of the agreements?

A. Yes, sir.

Q. Will you state what procedure,—strike that. What transpired at that conference, very briefly?

A. In anticipation of this meeting I had prepared a drafting of a resolution to be adopted by the stockholders authorizing the execution of this agreement with the Pacific Car and Foundry Company, the four-party agreement, and the only question to be decided was the manner in which Mr. Yost would be compensated for the value of his stock over and above his share of the physical assets in the liquidation.

Q. And what was said with reference to it?

A. We discussed means of paying him the sum of \$25,000 in addition to what he had received in liquidation of his stock, and the final conclusion was,——

Mr. Payne (Interposing): Now, if Your Honor please, [13] I will object. The final conclusions have been reduced to writing and put in evidence.

Mr. Schweppe: I am agreeable that that be stricken.

Q. (By Mr. Schweppe, continuing): These con-

(Testimony of Paul R. Strout.)

versations that you have just recited led up to the execution of Exhibits 8 and 9; is that correct?

A. Yes.

Q. In which there is set forth a plan of paying out the consideration or compensation to Mr. Yost?

A. Yes.

Q. For his consent to the execution of the Pacific Car and Foundry Company transaction?

A. That's correct.

Q. Is that correct? A. Yes.

Mr. Schweppe: You may examine.

### Cross-Examination

By Mr. Payne:

Q. You stated there were various drafts, proposed drafts, prepared by you in connection with these related transactions?

A. Not between the Newell brothers and Mr. Yost, but three or four alternative propositions at this first meeting held with the Pacific Car and Foundry Company. [137]

Q. And these negotiations went on for a long period of time?

A. Some two or three months.

Q. And finally they were all boiled down to the agreements which are in evidence; is that correct?

A. That is correct.

Mr. Payne: That is all.

Mr. Schweppe: That is all, Mr. Strout. Thank you.

(Witness excused.)

Mr. Schweppe: The taxpayer rests.

Mr. Payne: The respondent has no evidence, Your Honor.

The Court: Very well. Do you gentlemen desire to submit the matter on briefs?

Mr. Payne: Yes, I would like the privilege.

The Court: 45 days from this date for the opening brief for the Petitioner; is that sufficient?

Mr. Schweppe: Yes; the point is quite simple.

The Court: And 30 days thereafter, is that sufficient for you, Mr. Payne?

Mr. Payne: Yes.

The Court: And 20 days for the filing of the reply brief, if you deem it advisable to file one. Thank you, very much, gentlemen. The proceedings stand submitted.

(Whereupon, at 10:30 a. m., November 2, 1944, hearing concluded.)

[Endorsed]: T.C.U.S. Filed Jan. 17, 1945. [138]

# UNITED STATES INDIVIDUAL INCOME AND DEFENSE TAX RETURN

Page 1  
**1940**

(Auditor's Stamp)

REVIEWED  
AUDIT REVIEW DIVISION  
By J. E. Stark  
DATE MAY 22 1941

FOR GROSS INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,  
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM  
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1940

or fiscal year beginning \_\_\_\_\_, 1940, and ended \_\_\_\_\_, 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third  
month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Geo. W. Yost

(Name) (Use given names of both husband and wife, if this is a joint return)

(Street and number, or rural route)

Edmonds

Snohomish

Wash.

(Post office)

(County)

(State)

(Do not use these spaces)

File  
Code

Serial  
No.

Date

Place

City

State

Zip

Country

Post Office

City

State

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INCOME		
Salaries and other compensation for personal services. (From Schedule A)	\$ 5,850	17
Dividends	9,253	00
Interest on bank deposits, notes, mortgages, etc.	1,269	07
Interest on corporation bonds		
Taxable interest on Government obligations, etc. (From Schedule B)	31	50
Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (Furnish names and addresses)		
Tricoach Sales Co.	8	09
Income from fiduciaries. (Furnish names and addresses)		
Rents and royalties. (From Schedule C)		
Income (or loss) from business or profession. (From Schedule D)		
Net short-term gain from sale or exchange of capital assets. (From Schedule E)		
Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)	Gain	601 12
Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)		
Other income (including income from annuities). (See instructions)	41	57
Total income in items 1 to 11. (Enter net taxable income in Schedule I)	\$ 17,788	86

DEDUCTIONS		
Contributions paid. (Explain in Schedule H)	\$ 35	00
Interest. (Explain in Schedule H)		
Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)	186	18
Other deductions authorized by law. (Explain in Schedule H)		
Less: Juanita Yost portion	8,606	47
Total deductions in items 13 to 18		
Net income (item 12 minus item 19)	\$ 8,961	21

COMPUTATION OF TAX		
Net income (item 20 above)	\$ 8,961	21
Less: Personal exemption. (From Schedule J-1)	\$ 777	37
Credit for dependents. (From Schedule J-2)	800	00
Balance (surplus net income)	\$ 7,383	84
Less: Interest on Government obligations, etc. (See Instruction 25)	\$ 15	75
Earned income credit. (From Schedule K-1 or K-2)	300	00
Balance subject to normal tax	\$ 7,068	09
28. Normal tax (4% of item 27)	\$ 282	72
29. Surtax on item 24. (See Instruction 29)	163	03
30. Total (item 28 plus item 29)	\$ 445	75
31. Total income tax (Sum 30, or if you had a net long-term capital gain or loss, enter line 14, Schedule F)	\$ 445	75
32. Less: Income tax paid on account		
33. Less: Income tax paid to a foreign country or U. S. possession. (Attach Form 1116)		
34. Balance of income tax (Sum 31 minus items 32 and 33)	\$ 445	75
35. Defense tax (10% of item 31). (See Instruction 35)	44	58
36. Total income and defense taxes due (Sum 34 plus item 35)	\$ 490	33

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CORRECTLY.

Y Y I

1940

1940





**Form 1041-1**  
**Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, COMMISSIONS, BONUSES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See instruction 1)**

Name and address of payor—If a governmental unit, indicate whether "Federal," "State," or "Local"	2. Amount	3. Expenses (deductions)	4. Amount
Urban Trans. Sys. Seattle	6,000 00	40% Car Expense	549 83
Auto Co., Edmonds	300 00		
M. Yost Estate "	100 00		
Total of column 2 minus total of column 4 (enter as item 1, page 1)			5,850 17

**Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See instruction G)**

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal, interest on which is exempt from taxation	5. Interest on amount in excess of exemption
Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$ 198 95	All	XXXXXX XX
Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	XXXXXX XX
Obligations of United States issued on or before September 1, 1917—Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXX XX
United States Savings Bonds and Treasury Bonds			All	XXXXXX XX
Obligations of instrumentalities of the United States (other than obligations to be reported in (1) above)	1,400 00	31 50	\$5,000	\$
Total (enter as item 5, page 1)			None	31 50

**Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See instruction 8)**

1. Kind of property (lease)	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 5, page 1)
	\$	\$	\$	\$	\$

Sum of deductions claimed in columns 4 and 5

**Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See instruction 9)**

(1) nature of business \_\_\_\_\_; (2) number of places of business \_\_\_\_\_; (3) business name \_\_\_\_\_  
 and address if different from name and address on page 1 \_\_\_\_\_

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
Beginning inventory at beginning of year	\$	11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	\$
Merchandise bought for sale	\$	12. Interest on business indebtedness	\$
Material and supplies	\$	13. Taxes on business and business property	\$
Other costs (itemize below)	\$	14. Losses (explain below)	\$
Total of lines 2 to 6	\$	15. Bad debts arising from sales or services	\$
Ending inventory at end of year	\$	16. Depreciation, obsolescence, and depletion (explain in Schedule E)	\$
Net cost of goods sold (line 7 minus line 8)	\$	17. Rent, repairs, and other expenses (itemize below or on separate sheet)	\$
Gross profit (line 1 minus line 9)	\$	18. Total of lines 11 to 17	\$
		19. Net profit (or loss) (line 1 minus lines 9 and 18) (enter as item 9, page 1)	\$

If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M," on lines 2 and 8 to show whether inventories are valued at cost, or cost or market, whichever is lower.  
 Explanation of deductions claimed in lines 6, 14, and 17 \_\_\_\_\_

**Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G**

1. Kind of property (building, other material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$



DUPLICATE

# CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

Feb. 10, 1944  
SEATTLE, WASH.

In pursuance of the provisions of existing Internal Revenue Laws

George W. York

, a taxpayer

(~~accompanied~~ of Blonde, Washington and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (~~or taxpayers~~) for the taxable year (~~or years~~) ended December 31, 1940

, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1945, except that, if a notice of a deficiency in tax is sent to said taxpayer (~~or taxpayers~~) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

George W. York  
Taxpayer. 1

Taxpayer. 1

Taxpayer. 1

[SEAL]

By \_\_\_\_\_

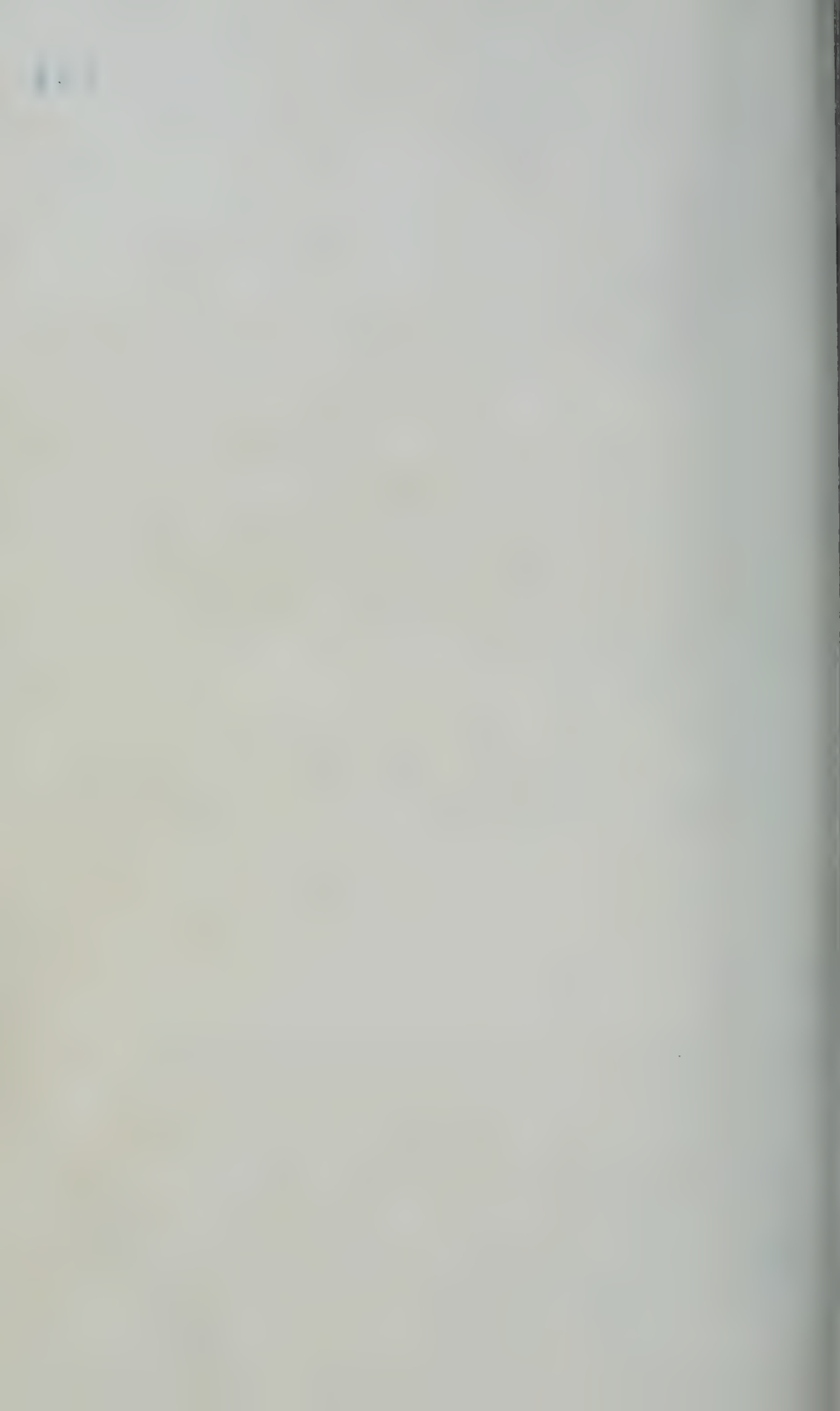
Harold H. Graves  
Commissioner of Internal Revenue.

By Chm 2/4/44  
(Date)

"This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

"If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.



## Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instruction 10)

1. Kind of property (if sold, state whether or not depreciable)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (include in column 6)	8. Gain or loss (column 4 plus column 6 minus the sum of columns 5 and 7)	9. Gain or loss to be taken into account a. For sale b. For gift
<b>SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS</b>								
			\$	\$	\$	\$	\$	100
								100
								100
								100
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)								\$

<b>LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 36 MONTHS</b>								
			\$	\$	\$	\$	\$	66%
								66%
								66%
								66%

<b>LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 36 MONTHS</b>								
			\$	\$	\$	\$	\$	50
								50
								50
								50
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$

1. Classification		2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year)	3. Net gain or loss to be taken into account from column 1A, above		4. Net gain or loss to be taken into account from preceding and "common trust funds"		5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary	
			Gain	Loss	Gain	Loss	Gain	Loss
Net short-term capital gain or loss (enter on item 10 (a), page 1, amount of gain shown in column 3)		\$	\$	\$	\$	\$	\$	No net loss allowable (See instruction 10)
Net long-term capital gain or loss (enter on item 10 (b), page 1, amount of gain or loss shown in column 3)		\$	\$	\$	\$	\$	\$	\$
			\$ 801.12				\$ 801.12	

## COMPUTATION OF ALTERNATIVE TAX

Use only (1) if you had a net long-term capital gain, and item 24, page 1, exceeds \$22,000

(2) if you had a net long-term capital loss, and such loss plus item 24, page 1, exceeds \$22,000

Net income (item 28, page 1). (See instruction 10)	\$	10. Normal tax (4% of line 9)	\$
Net long-term capital gain (item 10 (b), page 1)		11. Surtax on line 6. (See instruction 29)	
Net long-term capital loss (item 10 (a), page 1)		12. Partial tax (line 10 plus line 11)	\$
Net short-term capital gain (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See instruction 10)	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
Net personal exemption. (From Schedule J-1)	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	
Credit for dependents. (From Schedule J-2)	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
Net income (surplus net income)	\$	15. Total normal tax and surtax (item 30, page 1)	\$
Net income on Government obligations, etc. (See instruction 25)	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	\$
Excess income credit. (From Schedule K-1 or K-2). (See inst. 10)	\$		
Net income subject to normal tax	\$		

## Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subse- quent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (include in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter on item 10 (c), page 1)						\$

On family, fiduciary, or business relationship to you, if any, of purchase of any of the items on this page:

If such items were acquired by you other than by purchase, explain fully how acquired:

Y Y Y





Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
15	Real Estate	\$ 56 02	13	Boy Scouts	\$ 20 00
	60% Gas Tax & Car Lic.	42 00		M. E. Church	10 00
	Sales Tax	88 16		Red Cross	5 00
		186 18			25 00

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(I) Personal Exemption			(II) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old    Over 18 years old	Credit claimed
Single, or married and not living with husband or wife			Nona, Daughter	12	\$ 400 00
Married and living with husband or wife	12	2,000 00	Rita, "		400 00
Total of family (explain below)			Reason for support if over 18 years old		

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(I) If your net income is \$3,000 or less, use only this part of schedule		(II) If your net income is more than \$3,000, use only this part of schedule	
Net income (item 20, page 1)	\$	Earned net income (not more than \$14,000)	\$ 2,925 39
Earned income credit (10% of net income, above)		Net income (item 20, page 1)	9,193 72
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)	300 00

QUESTIONS

1. State your principal occupation or profession BUS. BUSINESS  
2. Check whether you are a citizen ☒ or a resident alien ☐  
3. Did you file a return for any prior year? YES If so, what was the latest year? 1939. To which Collector's office was it sent? Tacoma  
4. Were items of income or deductions of both husband and wife included in this return? YES  
5. State (a) Name of husband or wife if separate return was made Juanita Yost  
(b) Personal exemption, if any, claimed thereon 222.43  
(c) Collector's office to which it was sent Tacoma  
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.  
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 504 of the Internal Revenue Code? (Answer "yes" or "no") no (If answer is "yes," attach statement required by instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by Geo. W. Yost  
Before me this 13 day of March, 1941.

*George W. Yost*  
(Signature of taxpayer)

L. P. Ellington Notary Public  
(Signature and title of official administering oath)  
A return made by an agent must be accompanied by power of attorney. (See instruction E.)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouse preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

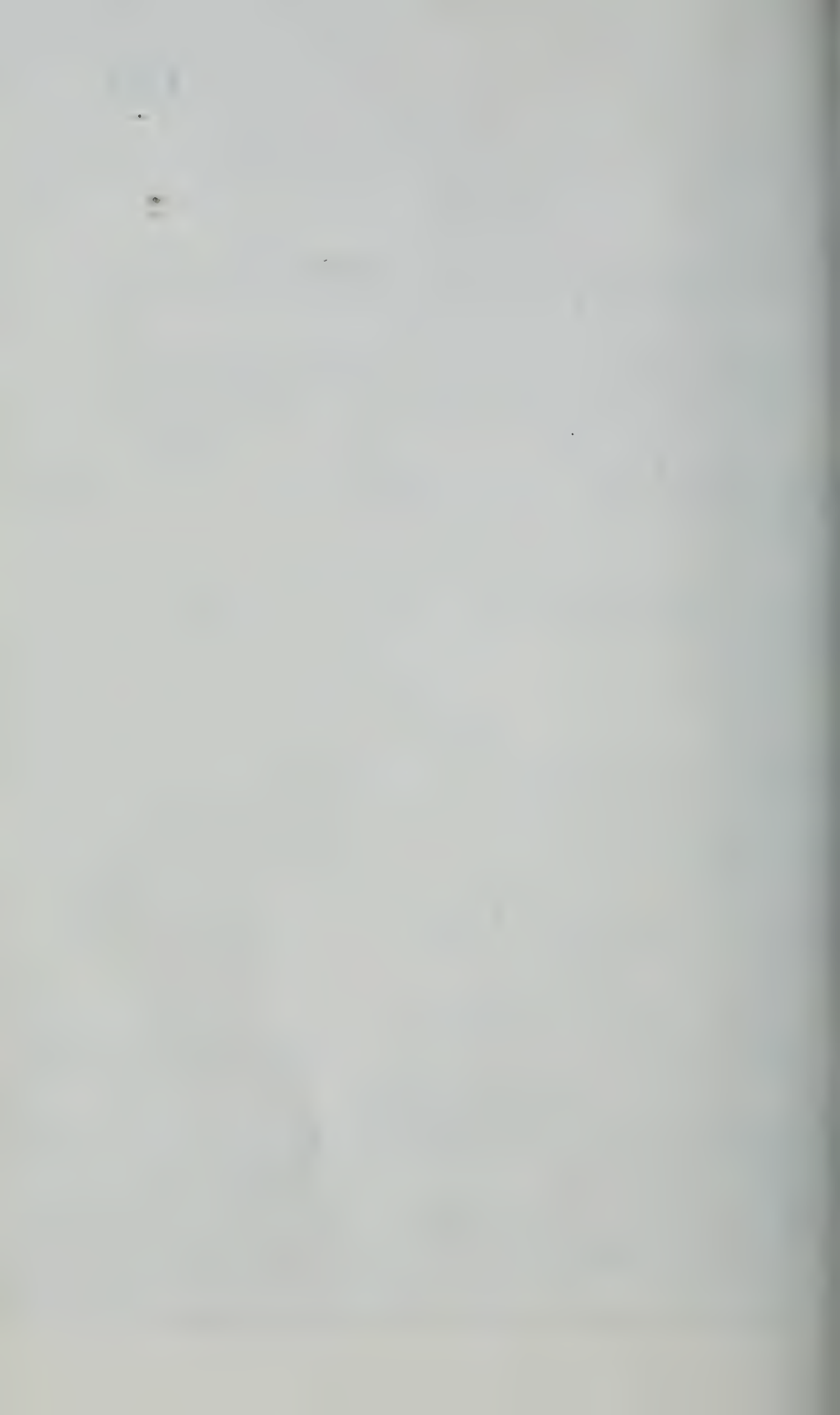
I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 13 day of March, 1941.

*George W. Yost*  
(Signature of person preparing the return)

L. P. Ellington Notary  
(Signature and title of official administering oath)





RM 1040  
 Department  
 Revenue Service

(Auditor's Stamp)

 UNITED STATES  
 INDIVIDUAL INCOME TAX RETURN

 Page 1  
 1941

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS NOT MORE THAN \$3,000 AND CONSISTS WHOLLY OF SALARIES, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST, RENT, ANNUITIES, OR ROYALTIES.

For Calendar Year 1941

or fiscal year beginning 1941, and ending 1942

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Geo. W. Yost

(Name) (Use given names of both husband and wife, if this is a joint return)

(Street and number, or rural route)

Edmonds Snohomish Wash

(Post office)

(State)

(Do not use these spaces)

 File Code  
 Serial No. 306733

 District  
 (Cashier's Stamp)

Cash-Check-M. O.

First Payment

 INCOME  
 Amount  
 Deductible Expenses  
 (Amount)  
 Items 7, 8, and 9, and 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, need not be considered unless you have income (or losses) in addition to items above.  
 Items 7, 8, and 9, and 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, need not be considered unless you have income (or losses) in addition to items above.  
 Net short-term gain from sale or exchange of capital assets. (From Schedule F)  
 Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)  
 Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)  
 Profit (or loss) from business or profession. (From Schedule H)  
 State total receipts, from line 1, Schedule H, \$ 761.48  
 (or loss) from partnerships, fiduciary income, and other income. (From Schedule I) 1442.58  
 Total income in items 1 to 9. \$ 2612.58

ITEMS 7, 8, AND 9, AND 1, 2, 3, 4, 5, 6, 7, 8, 9, AND 10, NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.

 Deductions  
 (Explain in Schedule C)  
 Net short-term gain from sale or exchange of capital assets. (From Schedule F)  
 Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)  
 Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)  
 Profit (or loss) from business or profession. (From Schedule H)  
 State total receipts, from line 1, Schedule H, \$ 761.48  
 (or loss) from partnerships, fiduciary income, and other income. (From Schedule I) 1442.58  
 Total income in items 1 to 9. \$ 2612.58

DEDUCTIONS

(Explain in Schedule C)

(Explain in Schedule C)

(Explain in Schedule C)

Net short-term gain from sale or exchange of capital assets. (From Schedule F)

Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)

Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

Profit (or loss) from business or profession. (From Schedule H)

State total receipts, from line 1, Schedule H, \$ 761.48

(or loss) from partnerships, fiduciary income, and other income. (From Schedule I) 1442.58

Total income in items 1 to 9. \$ 2612.58

Net income (item 10 minus item 17) \$ 1340.73

## COMPUTATION OF TAX

 Income (item 18 above) \$ 13240.73  
 Personal exemption \$ 730.74  
 Credit for dependents \$ 800.00  
 Surplus net income \$ 11,709.99  
 Item 4 (a) above \$ 1575  
 Earned income credit \$ 392.63  
 Income subject to normal tax \$ 11,311.61  
 Normal tax (4% of item 25) \$ 452.46  
 Surtax on item 22. (See Instruction 27) \$ 1747.50  
 Total item 26 plus item 27 \$ 2199.96  
 Total tax (item 28 or line 16, Schedule F) \$ 2199.96  
 Less: Income tax paid at source \$ 0  
 Income tax paid to a foreign country or U.S. possession. (Attach Form 1116) \$ 0  
 Balance of tax (item 29 minus items 30 and 31) \$ 2199.96

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and that of my own knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, and that I am not aware of any fraud or evasion in connection with the return.

 Made and sworn to by Geo. W. Yost  
 Date this 11th day of March 1942

 Signature and title of officer administering oath  
 R. P. Ellington Notary  
 Made by an agent must be accompanied by power of attorney. (See Instruction E.)

THIS RETURN WAS PREPARED FOR YOU BY SOME OTHER PERSON, THE AFFIDAVIT ON PAGE 4 MUST BE EXECUTED)

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10-94540





## Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction G)

Page 2

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal interest on which is exempt from taxation	5. Interest on amount in excess of exemption, and dividends subject to surtax only
Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.	\$	\$	All	XXXXXX XX
Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended.			All	XXXXXX XX
Obligations of United States issued on or before September 1, 1917.			All	XXXXXX XX
Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness issued prior to March 1, 1941.			All	XXXXXX XX
United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941.			\$5,000	\$
Obligations of instrumentalities of the United States (other than obligations to be reported in (4) above) issued prior to March 1, 1941.			None	
Dividends on share accounts in Federal savings and loan associations.	XXXXXXXXXX XX	XXXXXXXXXX XX	XXXX	
Total (enter as item 4 (a), page 1).				\$
Obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 4 (b), page 1).			Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
			\$	\$

## Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 5, page 1)
	\$	\$	\$	\$	\$

Explanation of deductions claimed in columns 4 and 5.

## Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 11, 12, 13, 14, 15, AND 16

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
11.	M.F. Church 1000 Bay St. 1500	25.00	13.	Real Estate	62.89
	School 4000 Red Cross 1000	50.00		60% of Gas Tax & License	34.95
	Cash Fund 1000 Girl Relief 1000	20.00		Driver's Lic.	60.00
		95.00		Sales Taxes	192.82

## Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(I) Personal Exemption			(II) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year	Credit claimed
				Under 18 years old	18 years or over
Single, or married and not living with husband or wife, and not head of family.		\$	Nona Yost, Daughter	12	\$ 400.00
Married and living with husband or wife.	12	1500.00	Rita " "	12	400.00
Head of family (explain below).					
Reason for support if 18 years or over					

## Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(I) If your net income is \$3,000 or less, use only this part of schedule	(II) If your net income is more than \$3,000, use only this part of schedule
Net income (item 18, page 1)	Earned net income (not more than \$14,000)
\$	\$ 3826.33
Earned income credit (10% of net income, above)	Net income (item 18, page 1)
	13240.73
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)
	382.63

## QUESTIONS

- State your principal occupation or profession. TRANS. MGR.
- Name and address of employer. Suburban Trans. System, 314 Central, Kansas City, Mo.
- Did you file a return for any prior year? YES If so, what was the latest year? 1940 To which Collector's office was it sent? 2nd Dist. Wash.
- If separate return was made for the current year, state:
  - Name of husband or wife. SURITA YOST
  - Personal exemption, if any, claimed thereon. 169.75
  - Collector's office to which it was sent. 2nd Dist. Wash.
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
- If return on cash basis, do you elect, under section 42, to include as income received in the current year the increase for current and prior years in the redemption price of noninterest-bearing obligations issued at a discount? No If so, attach statement listing obligations owned and computation of the accrued income. Report such income as interest in item 3 or 4, page 1, whichever applicable.
- Did you receive during the taxable year any nontaxable income other than interest reported in Schedule A (see Instruction G)? No If so, attach schedule showing source, nature, and amount of such income.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 301 of the Internal Revenue Code? No If so, attach statement required by Instruction J.



## DETACH PAGES 3 AND 4 IF NOT USED

## Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instruction 7)

Page 3

1. Kind of property (If necessary, attach statement of description (which not shown below))	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (unless in Schedule J)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Particulars 10. Amount
<b>SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS</b>								
			\$	\$	\$	\$	\$	100 \$
								100
								100
								100
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)								\$

<b>LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS</b>								
			\$	\$	\$	\$	\$	66% \$
								66%
								66%
								66%

<b>LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS</b>								
100000 Corp.	1/24/25	3/12/41	\$135700	\$57201	\$	\$	\$12,799 99	50 6400.00
								50
								50
								50
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$6400.00

## SUMMARY OF NET CAPITAL GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (net in excess of net income for such year)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnership and common trust funds		5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary	
		Gain	Loss	Gain	Loss	Gain	Loss
Total net short-term capital gain or loss (enter as item 7 (a), page 1, amount of gain shown in column 5)	\$	\$	\$	\$	\$	\$	No net loss allowable (See instruction 7)
Total net long-term capital gain or loss (enter as item 7 (b), page 1, amount of gain or loss shown in column 5)	\$6400.00	\$	\$	\$	\$	\$6400.00	

## COMPUTATION OF ALTERNATIVE TAX

Use only: If you had a net long-term capital gain, and item 22, page 1, exceeds \$12,000, or

If you had a net long-term capital loss, and such loss plus item 22, page 1, exceeds \$12,000

Net income (item 18, page 1). (See instruction 7)	\$	10. Normal tax (4% of line 9)	\$
(a) Net long-term capital gain (item 7 (b), page 1)	\$	11. Surtax on line 6. (See instruction 27)	
(b) Net long-term capital loss (item 7 (b), page 1)	\$	12. Partial tax (line 10 plus line 11)	\$
Primary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See instruction 7)	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
Less: Personal exemption. (From Schedule D-1)	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	
Credit for dependents. (From Schedule D-2)	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
Balance (surtax net income)	\$	15. Total normal tax and surtax (item 28, page 1)	\$
Less: Item 4 (a), page 1	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 29, page 1)	\$
Earned income credit. (From Schedule E-1 or E-2). (See inst. 7)	\$		
Balance subject to normal tax	\$		

## Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See instruction 7)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (unless in Schedule J)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 7 (c), page 1)						\$

In the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page:  
 any of such items were acquired by you other than by purchase, explain fully how acquired:





## Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

nature of business (2) number of places of business (3) business name  
 and address if different from name and address on page 1  
 receipts

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
used where inventories are an income-producing factor		11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	\$
Inventory at beginning of year	\$	12. Interest on business indebtedness	\$
Merchandise bought for sale		13. Taxes on business and business property	
		14. Losses (explain below)	
Material and supplies		15. Bad debts arising from sales or services	
Other costs (itemize below)		16. Depreciation, obsolescence, and depletion (explain in Schedule J)	
Total of lines 2 to 6	\$	17. Rent, repairs, and other expenses (itemize below or on separate sheet)	
Inventory at end of year		18. Total of lines 11 to 17	\$
Cost of goods sold (line 7 minus line 8)	\$	19. Total of lines 9 and 13	\$
Net profit (line 1 minus line 9)	\$	20. Net profit (or loss) (line 1 minus line 19) (enter as item 8, page 1)	\$

the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M," on lines to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed in lines 6, 14, and 17

## Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

NAME (OR LOSS) FROM PARTNERSHIPS, SYNDICATES, ETC. (SEE INSTRUCTION 9 (a)) (FURNISH NAMES AND ADDRESSES)

*Tricoach Sales Co. c/o Paul Street*  
*Henry Bldg. SEATTLE, WASH*

INCOME FROM FIDUCIARIES (FURNISH NAMES AND ADDRESSES)

INCOME FROM OTHER SOURCES (STATE NATURE)

Total amounts in Schedule I. (Enter as item 9, page 1)

## Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES F, G, AND H

1. Kind of property (e.g., auto, material of which substantially consumed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepre- ciatable property)	4. Assets fully depre- ciated in use at end of year	5. Depreciation al- lowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulat- ing depre- ciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$

## AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any paying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this \_\_\_\_\_ day  
 \_\_\_\_\_, 194\_\_\_\_\_



*[Signature]*  
 (Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Place of firm or employer, if any)





In the United States Circuit Court of Appeals,  
for the Ninth Circuit

(The Tax Court of the United States

Docket No. 4969)

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW AND ASSIGN-  
MENTS OF ERROR

To the Honorable Judges of the United States Cir-  
cuit Court of Appeals, for the Ninth Circuit:

Comes now the petitioner, George W. Yost, by  
his attorneys Alfred J. Schweppe and Maurice R.  
McMicken, and respectfully shows:

I.

JURISDICTION

George W. Yost and Juanita Yost are husband  
and wife, residing at Edmonds, Washington. They  
each filed separate income tax returns, reporting  
their respective one-half of the community income  
for the years involved, namely, for the calendar  
years 1940 and 1941, with the Collector of Internal  
Revenue for the District of Washington, at Tacoma,  
Washington, which said collection district is within

the jurisdiction of the United States Circuit Court of [148] Appeals for the Ninth Circuit, wherein this review is sought.

Petitioner seeks a review of the decision of The Tax Court of the United States, pursuant to the provisions of § 1141 and 1142 of the United States Internal Revenue Code.

## II.

### PRIOR PROCEEDINGS

On March 23, 1944, the respondent, in accordance with § 272 of the Internal Revenue Code, advised petitioner, George W. Yost, by registered mail that the determination of said petitioner's income tax liability for the taxable year 1940 disclosed a deficiency in tax of \$75.44, and for the taxable year 1941 disclosed a deficiency of \$1,071.70, or a total deficiency for said two years of \$1,147.14 for said petitioner. A similar letter was sent to Juanita Yost.

Thereafter, on May 17, 1944, George W. Yost and Juanita Yost each filed a separate petition from his respective notice of deficiency with The Tax Court of the United States, the appeal of George W. Yost being Docket No. 4969 and the appeal of Juanita Yost being Docket No. 4970. The respondent filed his separate answer to each of said petitions on June 20, 1944.

By stipulation, the two cases were consolidated for hearing and decision, and were heard at Seattle, Washington, on November 2, 1944, upon an agreed

stipulation of facts and additional testimony adduced at the trial. On May 28, 1945, The Tax Court of the United States promulgated its findings of facts and [149] opinion in the consolidated cause (5 T. C. No. 16); and on May 28, 1945, The Tax Court of the United States entered its separate decision in each cause, ordering and deciding that there were deficiencies in income tax for the calendar year 1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70 for each of said petitioners.

### III.

#### NATURE OF THE CONTROVERSY

The question presented for review is succinctly stated as follows:

Did the amounts of \$2,603.65 and \$12,799.99 received by the marital community composed of George W. Yost and Juanita Yost in the years 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell (over and above the repayment by said Newells of their loans), constitute ordinary income of said marital community, of which petitioner's one-half share thereof was fully taxable to him in the respective years (as contended by respondent and held by the Tax Court), or were said amounts derived from the sale or exchange of capital assets and thus constituted long term capital gains to said marital community under Section 117 I.R.C., and as such only 50% of petitioner's one-half share thereof should

be taken into account for income tax purposes of petitioner in the respective years (as contended by petitioner)?

Tricoach Corporation, a Washington corporation with its principal office at Seattle, was organized in February 1935, by [150] George W. Yost, who had been engaged in the bus transportation business in suburban Seattle, by Richard B. Newell, who had been draftsman and chief engineer for Heiser's, Inc., a Seattle manufacturer of bus and truck bodies, and by Robert L. Newell, who had been selling bus and truck bodies throughout the Pacific Northwest for a Portland, Oregon, concern.

Its authorized capital was \$50,000, composed of 1,000 shares of the par value of \$50.00 each. Yost subscribed for 150 shares, paying \$7,500.00 therefor, and each of the Newells subscribed for 5 shares, each paying \$250.00.

During its entire operation, Robert was president and sales manager; Richard was vice-president, treasurer and chief engineer; and Yost was secretary.

The salary of each of the Newells was originally fixed at \$250.00 per month, but in addition thereto they and Yost were each to receive adjusted compensation at the end of each year equivalent to one-third of the year's net profits after provision for payment of dividends on the outstanding stock.

The eleven months of 1935 resulted in a deficit of \$1,068.18, which was wiped out in 1936 by Yost contributing \$1,001.42 and each of the Newells



\$33.38, being pro rata according to their stock-holdings.

The year 1936 was profitable, Yost receiving in that year \$10,140.95 as adjusted compensation and \$11,649.64 in dividends, while each of the Newells received salary and adjusted compensation [151] totaling \$13,440.95 (their salaries having been increased to \$300.00 per month commencing in July) and \$388.32 in dividends.

In December 1936, 764 additional shares were issued at par, 348 to Yost, and 208 to each of the Newells, making 924 shares outstanding and a paid-in capital of \$46,200.00.

The year 1937 was also profitable, Yost receiving in that year \$11,927.71 in adjusted compensation and \$7,968.08 in dividends, and each of the Newells received salary and adjusted compensation totaling \$15,527.71 and also \$3,827.81 in dividends.

In December 1937, the remaining 76 shares were issued at par, 12 shares to Yost and 32 shares to each of the Newells, making the stockholdings then, Yost 510 shares and each of the Newells 245.

By the end of 1937, Yost, on his original investment in Tricoach of \$7,500.00, had received in dividends and adjusted compensation a total of \$41,686.38, out of which he had paid to Tri-coach \$1,001.42 as his pro rata of the 1935 deficit and \$18,000.00 for 360 additional shares of stock, leaving him with a net amount of \$22,684.96 and he owned 510 fully paid up shares, or 51% of the stock of Tricoach.

In March 1936, Heiser's, Inc. made an assign-

to enter into the agreement with Pacific; and to enter into a lease and option agreement with the Newells in regard to Tricoach's machinery and equipment.

On August 3, 1938, the separate agreements between Yost and the two Newells were executed and the four-party agreement also executed.

In 1940 the Newells paid to Yost, under their respective agreements, the following amounts, which were applied by the Yosts as follows: [154]

	From Robert L. Newell	From Richard B. Newell	Total
Payments received.....	\$2,603.65	\$2,603.65	\$5,207.30
Applied toward payment of their loans .....	1,301.83	1,301.82	2,603.65
	<hr/>	<hr/>	<hr/>
Treated as a community capital gain .....	\$1,301.82	\$1,301.83	\$2,603.65

On June 26, 1940, the Yosts received \$25,500.00 and the two Newells each \$12,250.00 from Tricoach as liquidating dividends. As the Yosts' stock had cost them \$25,500.00 plus \$1,001.42 as their share of the 1935 deficit, it had a basis in their hands of \$26,501.42. Respondent, in determining the deficiencies for 1940, allowed as a community deduction 50% of said long term capital loss of \$1,001.42, or \$500.71, and allowed each of the Yosts a deductible loss of one-half thereof, or \$250.35, which item is not in controversy.

In 1941 the Newells paid to Yost, under their respective agreements, the following amounts, which were applied by the Yosts as follows:

	From Robert L. Newell	From Richard B. Newell	Total
Payments received .....	\$9,286.00	\$9,286.00	\$18,572.00
Applied toward balance of loans .....	2,886.00	2,886.01	5,772.01
	<hr/>	<hr/>	<hr/>
Treated as a community capital gain .....	\$6,400.00	\$6,399.99	\$12,799.99

In 1942 the Newells each paid Yost \$610.34, making the total received by the Yosts from the two Newells, \$224,999.98. [155]

In petitioner's 1940 income tax return, he reported as a long term capital gain \$1,301.82, being his community one-half of the \$2,603.65 received from the two Newells in 1940 after the above mentioned application on their indebtedness, and as such long term capital gain, there was taken into account for tax purposes, only 50% thereof, or \$650.91.

Respondent, in his deficiency letter, held that said amount of \$1,301.82 received by petitioner in 1940 was not a capital gain but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1940 by \$650.91, and the Tax Court sustained respondent's action in so doing.

In petitioner's 1941 income tax return, he reported as a long term capital gain \$6,400.00, being his community one-half of the \$12,800.00 received from the two Newells in 1941 after the above mentioned application on the balance of their indebtedness, and as such long term capital gain, there was taken into account, for tax purposes only 50% thereof, or \$3,200.00.

Respondent, in his deficiency letter, held that said amount of \$6,400.00 received by petitioner in 1941 was not a capital gain but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1941 by \$3,200.00, and the Tax Court sustained respondent's action in so doing.

Petitioner contends that such payments received in each of the years 1940 and 1941 (over and above repayments on the loans) were derived from the sale or exchange of capital assets, and thus [156] constituted long term capital gains, and that only 50% of petitioner's community one-half interest thereof was taxable to him.

#### IV.

#### ASSIGNMENTS OF ERROR

That petitioner, George W. Yost, being aggrieved by the opinion and decision of The Tax Court of the United States in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of manifest errors which therein occurred and intervened to petitioner's prejudice. The errors committed by The Tax Court of the United States which are relied upon by petitioner as the basis of this petition for review are as follows:

That The Tax Court of the United States erred:

1. In holding and deciding that the amounts of \$2,603.65 and \$12,799.99 received by the marital



community composed of George W. Yost and Juanita Yost in 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell (over and above the repayment by said Newells of their loans), constituted ordinary income and that petitioner's community one-half interest thereof was fully taxable to him.

2. In failing to hold and decide that the amounts of \$2,603.65 and \$12,799.99 received by the marital community composed of George W. Yost and Juanita Yost in 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell (over and above the repayment by said Newells of their loans), were derived from the [157] sale or exchange of capital assets and thus constituted long term capital gains, and that only 50% of petitioner's community one-half interest thereof was taxable to him.

3. In ordering and deciding that there are deficiencies in petitioner's income taxes of \$75.44 for 1940 and \$1,071.70 for 1941.

4. In failing to order and decide that there is a deficiency in petitioner's income tax for 1940 of \$2.57 and no deficiency for 1941.

Wherefore, George W. Yost petitions that said opinion and decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court



and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken, to the end that the errors complained of may be reviewed and corrected by said Court.

MAURICE R. McMICKEN  
ALFRED J. SCHWEPPE  
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed Aug. 24, 1945. [158]

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The Tax Court of the United States

Docket No. 4969

GEORGE W. YOST,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

NOTICE OF FILING PETITION FOR  
REVIEW

To John P. Wenchel, Chief Counsel for the Bureau  
of Internal Revenue, Internal Revenue Building,  
Washington, D. C.

Sir:

Please take notice that the undersigned is mailing today to The Tax Court of the United States, Washington, D. C., to be filed with the Clerk thereof, the Petition of George W. Yost, a copy of which

is annexed hereto, for review by the United States Circuit Court of Appeals, for the Ninth Circuit, of the Decision of The Tax Court of the United States entered in the above cause upon the records of said Tax Court on May 28, 1945.

Dated: August 22, 1945.

/s/ MAURICE R. McMICKEN

/s/ ALFRED J. SCHWEPPE,  
Counsel for Petitioner

Personal service of the above and foregoing Notice, together with a copy of the Petition for review and Assignments of Error mentioned therein, is hereby acknowledged this 24th day of August, 1945.

/s/ J. P. WENCHEL

Chief Counsel for the Bureau  
of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Aug. 25, 1945. [159]

In the United States Circuit Court of Appeals for  
the Ninth Circuit

T. C. Docket No. 4969

GEORGE W. YOST,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

T. C. Docket No. 4970

JUANITA YOST,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### ORDER

Motion for preparation of the records on review in the above causes and the printing thereof, having been made by counsel for the above named petitioners, and consented to by counsel by respondent,

It Is Hereby Ordered

1. That the certified records sur petitions for review shall be made upon separate designations for record on review in the usual course and that a complete transcript of record be filed only in the case of *George W. Yost, v. Commissioner of Internal Revenue*, T. C. Docket No. 4969, which shall include, inter alia, a copy of the stipulation of facts filed with The Tax Court of the United States in the consolidated [160] causes and a copy of the

Official Reporter's Minutes of the Proceedings and testimony and exhibits adduced in evidence at the consolidated hearing before The Tax Court on November 2, 1944, and a copy of the Order entered hereon by this Court; and that an abbreviated record be filed in the case of *Juanita Yost v. Commissioner of Internal Revenue*, T. C. Docket No. 4970, which shall contain only the following documents; Docket Entries; petition and answer; petition for review and notices; orders of enlargements of time, if any; and the designation for record.

2. That the two cases be docketed in the usual course but that only the complete record relating to the case of *George W. Yost v. Commissioner of Internal Revenue*, T. C. Docket No. 4969 (including any subsequent documents filed in this case prior to printing) shall be printed and only said case shall be briefed and presented to the Court in argument for decision, but that the matters contained in the abbreviated record of the related case may be referred to by counsel in their respective briefs filed herein and on oral arguments and considered by the Court with the same force and effect as if included in the printed record on review herein.

3. That the abbreviated record in the case bearing T. C. Docket No. 4970, remain unprinted in the office of the Clerk of the reviewing Court herein and further proceedings thereon be suspended until the decision of The Tax Court of the United States in the case of *George W. Yost v. Commissioner of*

Internal Revenue bearing T. C. Docket No. 4969, shall become final within the meaning of Section 1140 of the Internal Revenue Code, and upon such decision becoming final in such case (T. C. Docket No. 4969), either of the parties in the cause bearing [161] T. C. Docket No. 4970, may, upon formal notice to the other and upon the basis of this stipulation and a certified copy of the said final decision in the case of George W. Yost (T. C. Docket No. 4969), apply for an order directing the entry of judgment in the case bearing T. C. Docket No. 4970, corresponding to the result in the case of George W. Yost (T. C. Docket No. 4969).

4. That the Clerk of this Court be instructed to transmit two certified copies of the order of this Court entered hereon to the Clerk of the Tax Court of the United States at Washington 25, D. C., one of which to be by him incorporated in the transcript of record on review in the case of George W. Yost v. Commissioner of Internal Revenue bearing T. C. Docket No. 4969, as certified and transmitted to this Court.

Done this 12th day of September, 1945.

(Signed) WILLIAM DENMAN,  
Judge

A true copy. Attest. Sept. 12, 1945.

/s/ PAUL P. O'BRIEN,  
Clerk.

[Endorsed]: Filed Sept. 12, 1945. (s) Paul B. O'Brien, Clerk.

[Endorsed]: T.C.U.S. Filed Sept. 18, 1945.



[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the petitioner herein:

1. Docket entries of the proceedings.

2. Pleadings:

(a) Petition, including annexed copy of deficiency notice and statement attached thereto.

(b) Answer.

3. Opinion of Tax Court.

4. Decision of Tax Court.

5. Stipulation for consolidation and stipulation of facts, together with photostatic or other copy of all exhibits attached and made a part thereof.

6. Copy of Official Reporter's Minutes of Proceedings and testimony adduced at hearing before The Tax Court on November 2, 1944, pages A and 1 to 35 both inclusive. [163]

7. Photostatic copies of respondent's exhibits A-1 and A-2.

8. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

9. Order for the Records and Printing.

10. Orders enlarging time for the preparation of the evidence and for transmission and filing of the transcript of record on review, if any.

11. This designation.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ALFRED J. SCHWEPPE

657 Colman Building

Seattle 4, Washington

MAURICE R. McMICKEN

827 Central Building

Seattle 4, Washington

Counsel for Petitioner

Service of a copy of the within Designation for Record is hereby admitted this 17th day of Sept. 1945.

J. P. WENCHEL, CAR

Chief Counsel, Bureau of Internal Revenue

Attorney for Respondent

[Endorsed]: T.C.U.S. Filed Sept. 17, 1945. [164]

The Tax Court of The United States  
Washington

Docket No. 4969

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 164, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1 day of Oct. 1945.

(Seal)

B. D. GAMBLE

Clerk, The Tax Court of the  
United States.

[Endorsed]: No. 11155. United States Circuit Court of Appeals for the Ninth Circuit. George W. Yost, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed October 13, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In The United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11155

(T. C. Docket No. 4969)

GEORGE W. YOST,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD TO BE PRINTED

Comes now the Petitioner on Review herein and adopts as his Statement of Points on which he intends to rely on the Review herein the Assignments of Errors included in his Petition for Review within the Transcript of Record, and he also desig-

nates for printing the entire Transcript of Record transmitted to this Court by the Clerk of the Tax Court of the United States, together with this Statement and Designation.

MAURICE R. McMICKEN

ALFRED J. SCHWEPPE

Counsel for Petitioner

[Endorsed]: Filed Oct. 22, 1945. Paul P. O'Brien, Clerk.





No. 11155

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GEORGE W. YOST,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

UPON PETITION TO REVIEW A DECISION OF THE TAX  
COURT OF THE UNITED STATES

---

PETITIONER'S BRIEF

---

MAURICE R. McMICKEN,

827 Central Building,

Seattle 4, Washington.

ALFRED J. SCHWEPPE,

657 Colman Building,

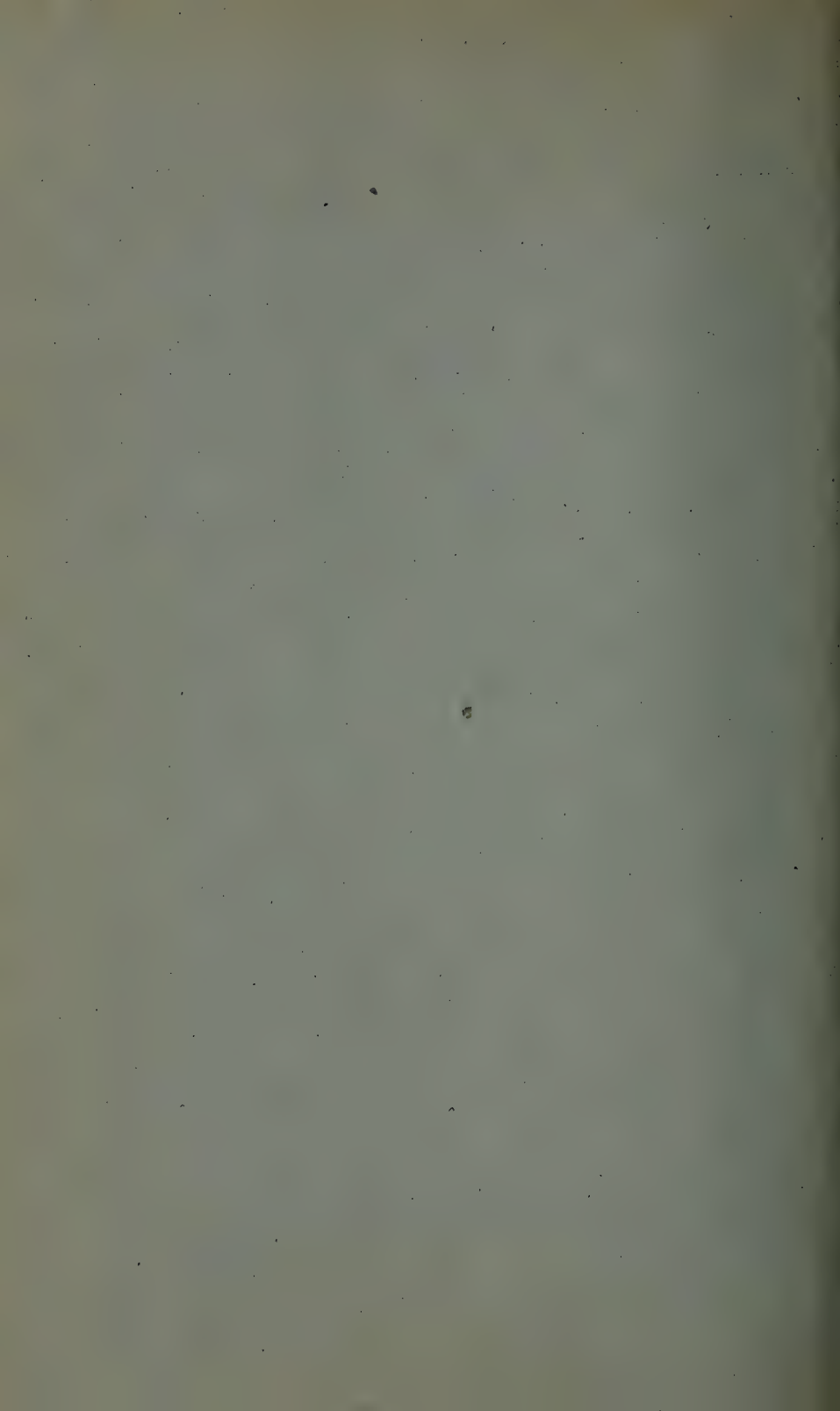
Seattle 4, Washington.

*Attorneys for Petitioner.*

**FILED**

24 1945

PAUL P. O'BRIEN,  
CLERK



No. 11155

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

GEORGE W. YOST, *Petitioner,*  
vs.  
COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

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UPON PETITION TO REVIEW A DECISION OF THE TAX  
COURT OF THE UNITED STATES

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PETITIONER'S BRIEF

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Seattle 4, Washington.

ALFRED J. SCHWEPPE,  
657 Colman Building,  
Seattle 4, Washington.  
*Attorneys for Petitioner.*





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**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

<hr/> GEORGE W. YOST,	<i>Petitioner,</i>	}	<b>No. 11155</b>
vs.			
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent.</i>		

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UPON PETITION TO REVIEW A DECISION OF THE TAX  
COURT OF THE UNITED STATES

---

**PETITIONER'S BRIEF**

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**OPINION BELOW**

The only previous opinion in this case is the opinion of the Tax Court of the United States, 5 T.C. ...., No. 16 (R. 27-45).

**JURISDICTION**

This is a proceeding to review a decision of the Tax Court of the United States, entered May 28, 1945, determining petitioner's liability for additional income taxes for the calendar years 1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70 (R. 45-46).

From respondent's determination of proposed deficiencies for each of said years, an appeal was taken to the Tax Court of the United States under Section 272(a) I.R.C. (R. 3-21).

By stipulation (R.46) said cause was consolidated for hearing and opinion with an identical cause of petitioner's wife, Juanita Yost, and the Tax Court's opinion in the consolidated cause was filed May 28, 1945 (R. 27-45), and is reported as 5 T.C. ...., No. 16. The Tax Court's decision thereon against this petitioner was entered on May 28, 1945 (R. 45-46).

Petitioner and his wife, Juanita Yost, reside at Edmonds, Washington, and they filed separate income tax returns on the community property basis for each of the years 1940 and 1941 with the Collector of Internal Revenue at Tacoma, Washington, within this circuit (Stip. 1, R.46).

This appeal was taken by Petition for Review filed August 24, 1945 (R. 161-172) and notice of such filing was served on respondent the same day and filed August 25, 1945 (R. 172-173).

(A separate appeal was taken by petitioner's wife, Juanita Yost, at the same time, but by Order of this Court entered on September 12, 1945 (R. 174-176), only the record and the briefs in this case were to be printed.)

This Court has jurisdiction under Sections 1141 and 1142 I.R.C.

## STATEMENT OF THE CASE

The question involved in this review is:

Did the amounts of \$2,603.65 and \$12,799.99 received by the marital community composed of George W. Yost and Juanita Yost in the years 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell (over and above the repayment by said Newells of their loans), constitute ordinary income of said marital community, of which petitioner's one-half share thereof was fully taxable to him in the respective years (as contended by respondent and held by the Tax Court), or were said amounts derived from the sale or exchange of capital assets and thus constituted long-term capital gains to said marital community under Section 117 I.R.C., and as such only 50% of petitioner's one-half share thereof should be taken into account for income tax purposes of petitioner in the respective years (as contended by petitioner)?

The case was tried to the Tax Court on a stipulation of facts (R. 46-60) to which were annexed eleven exhibits (R. 60-118), and the oral testimony of petitioner (R. 129-139), Robert L. Newell (R. 140-144) and Paul R. Strout (R. 145-149).

The Tax Court found the stipulated facts (R. 28-40) and made additional findings from the oral testimony (R. 40).

The following is a summary of the facts found by the Tax Court, together with references to the printed record:

Tricoach Corporation, a Washington corporation



with its principal office at Seattle, was organized in January, 1935, by George W. Yost, who had been engaged in the bus transportation business in suburban Seattle, by Richard B. Newell, who had been draftsman and chief engineer for Heiser's, Inc., a Seattle manufacturer of bus and truck bodies, and by Robert L. Newell, who had been selling bus and truck bodies throughout the Pacific Northwest for a Portland, Oregon, concern (Stip. 4, 5, R. 47, 48; Opinion R. 28, 29).

Its authorized capital was \$50,000, composed of 1,000 shares of the par value of \$50.00 each. Yost subscribed for 150 shares, paying \$7,500.00 therefor, and each of the Newells subscribed for 5 shares, each paying \$250.00 (Stip. 6; R. 48; Opinion R. 29).

During its entire operation, Robert was president and sales manager; Richard was vice-president, treasurer and chief engineer; and Yost was secretary (Stip. 7, R. 48; Opinion R. 29).

The salary of each of the Newells was originally fixed at \$250.00 per month, but in addition thereto they and Yost were each to receive adjusted compensation at the end of each year equivalent to one-third of the year's net profits after provision for payment of dividends on the outstanding stock (Stip. 7, R. 48; Opinion R. 29, 30).

The eleven months of 1935 resulted in a deficit of \$1,068.18, which was wiped out in 1936 by Yost contributing \$1,001.42 and each of the Newells \$33.38, being pro rata according to their stockholdings (Stip. 8, 10, R. 49, 51).

The year 1936 was profitable, Yost receiving in that year \$10,140.95 as adjusted compensation and \$11,649.64 in dividends, while each of the Newells received salary and adjusted compensation totaling \$13,440.95 (their salaries having been increased to \$300.00 per month commencing in July) and \$388.32 in dividends (Stip. 9, 10; R. 49, 50; Opinion R. 30).

In December, 1936, 764 additional shares were issued at par, 348 to Yost, and 208 to each of the Newells, making 924 shares outstanding and a paid-in capital of \$46,200.00 (Stip. 9, R. 50; Opinion R. 30).

The year 1937 was also profitable, Yost receiving in that year \$11,927.71 in adjusted compensation and \$7,968.08 in dividends, and each of the Newells received salary and adjusted compensation totaling \$15,527.71 and also \$3,827.81 in dividends (Stip. 12, 13, R. 51, 52; Opinion R. 30).

In December, 1937, the remaining 76 shares were issued at par, 12 shares to Yost and 32 shares to each of the Newells, making the stockholdings then, Yost 510 shares and each of the Newells 245 (Stip. 11, R. 50; Opinion R. 30).

By the end of 1937, Yost, on his original investment in Tricoach of \$7,500.00, had received in dividends and adjusted compensation a total of \$41,686.38, out of which he had paid to Tricoach \$1,001.42 as his pro rata of the 1935 deficit and \$18,000.00 for 360 additional shares of stock, leaving him with a net amount of \$22,684.96 and he owned 510 fully paid up shares, or 51% of the stock of Tricoach (Stip. 14, R. 53; Opinion R. 31).

In March, 1936, Heiser's, Inc. made an assignment for the benefit of creditors, and all its machinery and equipment were sold to Pacific Car & Foundry Co. (hereinafter referred to as Pacific). Pacific installed said machinery in its Renton plant and commenced manufacturing bus bodies in competition with Tricoach, which resulted in considerable losses to Pacific in each of the years 1936 and 1937 (Stip. 16, R. 54; Opinion R. 32).

For several months throughout 1938, Pacific negotiated with the Newells and Yost for the purpose of accomplishing a merger or working out some method of eliminating the competition of Tricoach, and to secure the services of the two Newells to manage the production and sales of the motor coach division of Pacific. The arrangement finally worked out contemplated leasing by Tricoach of its machinery and equipment to the Newells for ten years, together with an option to them to purchase it by December 31, 1938, at its depreciated book value. The Newells were to sublease to Pacific all of the Tricoach machinery and equipment for 7½ years, from October 1, 1938, and it was to be moved, at Pacific's expense, to its Renton plant. Pacific was to operate its motor coach division for 7½ years from October 1, 1938, to employ the Newells for said period at a minimum salary of \$250.00 per month each, and in addition thereto, to pay each of the Newells one-sixth of the profits of the motor coach division earned during said term. Richard was to have charge of the production end and Robert was to manage the balance of the business. Pacific was to purchase, as needed, for cash at



then market prices, all of Tricoach's materials inventory, and to furnish free storage space for said inventory, if moved to the Renton plant. Such arrangement (Exh. 7, R. 80-104) is referred to in the opinion as the four-party agreement (Stip. 17, R. 54; Opinion R. 32, 33).

Since such arrangement would mean liquidation of Tricoach at the par value of its stock, as its earnings had previously been all distributed as adjusted compensation and dividends, Yost would not consent to such arrangement unless he were paid something over and above the liquidation value of his stock (R. 133, Opinion R. 40). In order to get Yost's consent, each of the Newells agreed to pay Yost a maximum of \$12,500.00, *i.e.*, one-third of the first \$37,500.00 each Newell was to receive out of his one-sixth of the net profits of the motor coach division of Pacific. Separate agreements were entered into by Yost with each Newell, whereby Yost agreed to loan each \$4,187.83, without interest. to be used by them to acquire from Tricoach for cash its machinery and equipment under the option. Each Newell agreed to pay to Yost one-third of the first \$37,500.00 each of them received out of his one-sixth of the net profits of Pacific's motor coach division, one-half of such payments to be applied in payment of their respective loans of \$4,187.83 until full payment thereof (Exh. 8 and 9, R. 104-111, Opinion R. 33-35).

To accomplish these arrangements, on August 2, 1938, a joint stockholders' and directors' meeting of Tricoach was held, at which it was resolved to discontinue its manufacturing operations about October 1,

1938; to gradually liquidate its affairs; to enter into the agreement with Pacific; and to enter into a lease and option agreement with the Newells in regard to Tricoach's machinery and equipment (Stip. 20, R. 56; Opinion R. 35-37).

On August 3, 1938, the separate agreements between Yost and the two Newells were executed and the four-party agreement also executed (Stip. 21, 22, R. 57; Opinion R. 35).

In 1940 the Newells paid to Yost, under their respective agreements, the following amounts, which were applied by Yost as follows:

	<i>From Robert L. Newell</i>	<i>From Richard B. Newell</i>	<i>Total</i>
Payments received....	\$2,603.65	\$2,603.65	\$5,207.30
Applied toward payment of their loans	1,301.83	1,301.82	2,603.65
Treated as a community capital gain	\$1,301.82	\$1,301.83	\$2,603.65
	(Stip. 23, R. 57; Opinion R. 37)		

On June 26, 1940, Yost received \$25,500.00 and the two Newells each \$12,250.00 from Tricoach as liquidating dividends. As Yost's stock had cost him \$25,500.00 plus \$1,001.42 as his share of the 1935 deficit, it had a basis in his hands of \$26,501.42. Respondent, in determining the deficiencies for 1940, allowed as a community deduction 50% of said long-term capital loss of \$1,001.42, or \$500.71, and allowed each of the Yosts a deductible loss of one-half thereof, or \$250.35, which item is not in controversy (Stip. 24, R. 51-58; Opinion R. 38).

In 1941 the Newells paid to Yost, under their re-



spective agreements, the following amounts, which were applied by Yost as follows:

	<i>From Robert L. Newell</i>	<i>From Richard B. Newell</i>	<i>Total</i>
Payments received....	\$9,286.00	\$9,286.00	\$18,572.00
Applied toward bal- ance of loans.....	2,886.00	2,886.01	5,772.01
Treated as a com- munity capital gain	\$6,400.00	\$6,399.99	\$12,799.99
(Stip. 25, R. 58; Opinion R. 38-39)			

In 1942 the Newells each paid Yost \$610.34, making the total received by Yost from the two Newells, \$24,999.98 (Stip. 26, R. 58-59; Opinion R. 39).

In petitioner's 1940 income tax return, he reported as a long-term capital gain \$1,301.82, being his community one-half of the \$2,603.65 received from the two Newells in 1940 after the above mentioned application on their indebtedness, and as such long-term capital gain, there was taken into account for tax purposes, only 50% thereof, or \$650.91 (Stip. 27, R. 59; Opinion R. 39).

Respondent, in his deficiency letter, held that said amount of \$1,301.82 received bby petitioner in 1940 was not a capital gain but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1940 by \$650.91 (R. 39) nd the Tax Court sustained respondent's action in so doing (R. 45).

In petitioner's 1941 income tax return, he reported as a long-term capital gain \$6,400.00, being his community one-half of the \$12,799.99 received from the two Newells in 1941 after the above mentioned application on the balance of their indebtedness, and as

such long-term capital gain, there was taken into account, for tax purposes, only 50 % thereof, or \$3,200.00 (Stip. 30, R. 59-60; Opinion R. 39-40).

Respondent, in his deficiency letter, held that said amount of \$6,400.00 received by petitioner in 1941 was not a capital gain but was ordinary income taxable in full, thereby increasing petitioner's taxable income for 1941 by \$3,200.00 (R. 40) and the Tax Court sustained respondent's action in so doing (R. 45).

Petitioner contends that such payments received in each of the years 1940 and 1941 (over and above repayments on the loans) were derived from the sale or exchange of capital assets, and thus constituted long-term capital gains, and that only 50 % of petitioner's community one-half interest thereof was taxable to him.

## ASSIGNMENTS OF ERROR

In setting forth the Assignments of Error herein, there has been combined Assignments of Error 1 and 2, also 3 and 4, as set forth in the Petition for Review. Assignment of Error I covers the sole question involved in this proceeding and II is applicable if petitioner's contention is upheld.

### I

The Tax Court erred in holding and deciding that the amounts of \$2,603.65 and \$12,799.99 received by the marital community composed of George W. Yost and Juanita Yost in 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell (over and above the repayment by said Newells of their loans), constituted ordinary income and that petitioner's community one-half interest thereof was fully taxable to him, and in failing to hold and decide that said amounts were derived from the sale or exchange of capital assets and thus constituted long-term capital gains, and that only 50% of petitioner's community one-half interest thereof was taxable to him.

### II

The Tax Court erred in ordering and deciding that there are deficiencies in petitioner's income taxes of \$75.44 for 1940 and \$1,071.70 for 1941, and in failing to order and decide that there is a deficiency in petitioner's income tax for 1940 of \$2.57 and no deficiency for 1941.

## ARGUMENT

## I.

**The Amounts of \$2,603.65 and \$12,799.99 Received by the Marital Community Composed of George W. Yost and Juanita Yost in 1940 and 1941, Respectively, from Richard B. Newell and Robert L. Newell (Over and Above the Repayment by said Newells of Their Loans) Were Amounts Derived from the Sale or Exchange of Capital Assets and thus Constituted Long-Term Capital Gains to the Marital Community Under Section 117 I.R.C., and as such, Only 50% of Petitioner's Community One-Half Interest Thereof was Taxable to Him in said Years. (Assignment of Error I)**

The sole question in this case is whether the following amounts received by the petitioner from the two Newells:

1940: \$2,603.65 (Exclusive of \$2,603.65 credited on their loans) (Stip. 23, R. 57, 37)

1941: \$12,799.99 (Exclusive of \$5,772.01 credited in payment of the balance of their loans) (Stip. 25, R. 58, 39)

in accordance with the provisions of Exhibits 8 (R. 104-107) and 9 (R. 108-111), the main consideration for which was:

"IN CONSIDERATION that the ~~second~~ party [Yost] shall consent to and enter into a certain contract between the Pacific Car and Foundry Company, a corporation, Tricoach Corporation, a corporation, *et al.*, a copy of which is attached hereto and marked 'Exhibit A,' \* \* \*" (Exhibits 8 and 9, R. 105, 108)

were capital gains as contended by the petitioner, or ordinary income as contended by respondent and held by the Tax Court (R. 45).



If they were capital gains, they were long-term capital gains under Section 117 I.R.C.\*, and only 50% thereof are to be taken into account in computing taxable income for the respective years, while if ordinary income the full amount is subject to tax in said years.

Petitioner claims that said amounts were derived from the sale or exchange of capital assets. There can be no question but that the 510 shares of stock of Tricoach Corporation owned by petitioner were capital assets as defined by Section 117 I.R.C.

Just prior to the time the four-party agreement (Exhibit 7, R. 80-104) and the agreements with the two Newells (Exhibits 8 and 9, R. 104-107, 108-111) were entered into, petitioners 510 shares of stock of Tricoach Corporation had two elements of value:

(a) 51% of the net tangible assets, cash and accounts receivable of the corporation. On liquidation this proved to be the par value of said shares, or \$25,500 (Stip. 24, R. 57), the par value of each share being \$50. This is further borne out by the fact that in both 1936 and 1937, the corporation distributed as dividends the entire net income of each of said years (Exhibits 3 and 5, R. 69, 72), so that at the end of each of said years the corporation had no surplus or deficit (Stip. 10, 13, R. 51, 52).

(b) 51% of the intangible or going concern value

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\*Note: Section 115 I.R.C.—“Distributions by Corporations” and Section 117 I.R.C.—“Capital Gains and Losses,” so far as material to the question involved herein, are printed in the Appendix of this Brief.



of the corporation. Yost and the two Newells at the first conference with the officials of the Pacific Car & Foundry Co. considered all the stock of the corporation to be worth \$100,000 (R. 130, 146), which indicated to their minds, at least, that the stock was worth double its par or book value, or that it had a value of \$50,000 in excess of its net assets. Robert L. Newell testified (R. 141) that when they were clearing themselves with Yost, in arriving at the amounts to be paid Yost, the two Newells figured \$50,000 for the physical value of the corporation and \$50,000 for the value of the going business, and since Yost had 51% of the stock, \$25,000 was his share of the value of such going business (R. 141).

Petitioner testified he would not have agreed to Tricoach Corporation going out of business except for the consideration to be paid him by the two Newells as set forth in Exhibits 8 and 9, and the Tax Court so found (R. 40-41). His testimony in this regard is:

“Q. Now referring to Exhibits 7 and 8, with which I think you are thoroughly familiar—Exhibits 8 and 9, I mean, — will you state the reason, on the basis of that discussion, that additional consideration or compensation set forth in those agreements was to be paid for you?”

“A. To put it simply, it was just compensation over and above my interest in the Tricoach Corporation to get me to step out of the business. It was just additional consideration, because the Company had been doing a very profitable business, and I would not step out for just my equity in the assets of the Tricoach Corporation.” (R. 132)

"Q. Were you prepared to step out of the Tricoach Corporation merely on the basis of getting your original capital back at that time?"

"A. I was not." (R. 133)

\* \* \* \* \*

"Q. I have just a couple of more questions. Exhibit 7, as I stated, is the four-party agreement. Would you have signed Exhibit 7 if it had not been for the additional consideration provided to be paid to you in Exhibits 8 and 9?"

"A. I certainly would not." (R. 133)

Would anyone in petitioner's position have agreed to Tricoach going out of business unless he was to be paid an additional consideration by the Newells?

Here was a corporation that commenced business in January, 1935, with an original capital of \$8,000, of which petitioner supplied \$7,500 and the Newells \$250 each (Stip. 6, R. 48). By the end of 1937, the corporation had paid to petitioner in dividends and salary a total of \$41,686.38, out of which he made payments back to the corporation of \$1,001.42 in payment of his pro-rata of the 1935 deficit and \$18,000 in payment for 360 additional shares, leaving him with a net amount of \$22,684.96, and he owned 510 fully-paid up shares, or 51% of the stock of the corporation (Stip. 14, R. 53; Opinion R. 31).

Each of the Newells, on his \$250 original investment, had fared equally well. The stipulated facts show they each received: in 1935, \$2,750 salary (Stip. 8, R. 49); in 1936, \$3,300 salary and \$10,140.95 adjusted compensation (Stip. 10, R. 50) also \$388.32 in dividends on their 5 shares of stock (Stip. 9, R. 49); and in 1937, \$3,600 salary and \$11,927.71 ad-

justed compensation (Stip. 13, R. 52) also \$3,827.81 dividends on their 245 shares (Stip. 12, R. 52), or a total in the three years of \$35,934.79 out of which each paid \$33.38 on his pro-rata of the 1935 deficit (Stip. 10, R. 51) and invested \$12,000 in payment of the 240 additional shares (Stip. 9, 11, R. 50, 51), leaving each with \$23,901.41 net cash after such payments.

Here, then, we have a corporation that in three years paid to its three stockholders a total of \$113,555.96 in salaries and dividends. It would seem that said corporation had a going concern value of far more than the \$50,000 they themselves put into it.

Is it any wonder that petitioner was not willing to have the corporation go out of business as contemplated by the four-party agreement (Exhibit 7), unless he was to be paid something over and above the liquidation value of his stock?

This the two Newells were willing to do, and the maximum each was to pay (Exhibits 8 and 9, R. 104, 108) was fixed at \$12,500, *i.e.*, one-third of the first \$37,500 each Newell was to receive out of his one-sixth share of the profits of the Motor Coach Division of the Pacific Car & Foundry Co. (Exhibit 7, R. 83).

Such payments were agreed to be made by the Newells for Yost's consent to the entering into by Yost and Tricoach Corporation of the four-party agreement (Exhibit 7), which necessarily resulted in Tricoach going out of business and liquidating its affairs.



**The Tricoach Liquidatiton Dividend received by petitioner was in exchange for his stock.**

There is no question but what Tricoach Corporation was completely liquidated. When asked on cross-examination as to the present status of Tricoach Corporation, Mr. Yost answered:

“It is in existence in name only. There are no assets or liabilities, and there were a couple of reasons why we saw fit to continue to pay the state corporation license, which costs only \$15 per year, in order to keep the Corporation alive in the event we would want to use it for some other purpose. I have done that for no other reason. It is cheaper than to create a new corporation if we merely keep it alive. It was entirely liquidated.” (R. 134)

On June 26, 1940, petitioner received \$25,500 from Tricoach Corporation on its liquidation (Stip. 24, R. 57; Opinion R. 38), said amount being the par value of petitioner's shares.

Section 115 I.R.C. (see Appendix) is entitled “Distributions by Corporations.” Sub-section (c) thereof provides:

“(c) Distributions in Liquidation. — Amounts distributed in complete liquidation of a corporation shall be *treated* as in full payment in exchange for the stock \* \* \*.” (Italics supplied)

The use of the word “treated” must have been for some good reason. It raises the question of: treated for what purpose? The only logical answer would be for “income tax purposes” since said section is a part of Chapter 1 of the Internal Revenue Code which deals entirely with income taxes.

The Tax Court stated (R. 41), in regard to said section:

"It is doubtful if we are at liberty to construe it, as petitioner obviously wishes it to be construed, as meaning in part payment for the stock."

Petitioner made no such contention in the Tax Court, nor does he do so here. Petitioner does contend that since said Section 115 deals only with "Distributions by Corporations," the words "full payment" can refer only to payments made by the corporation in exchange for the stock.

Applying said provision to the liquidation distribution in this case, it means that the \$25,500 distributed in complete liquidation of Tricoach Corporation shall be treated for income tax purposes as in full payment by Tricoach Corporation in exchange for petitioners stock in said corporation.

Said section accordingly specifically provides that such complete liquidation distribution is "in exchange for the stock."

Accordingly, such "exchange" brings the stock within the definition of the Capital Gain and Capital Loss provisions of Section 117 I.R.C.

**The payments from the Newells resulted in gains to petitioner from the exchange of capital assets, and hence were capital gains.**

As shown above, the \$25,500 liquidation distribution by Tricoach in June, 1940, is treated as full payment by Tricoach in exchange for the stock, by Section 115(c) I.R.C. Said stock cost petitioner \$26,-



501.42, so that on the liquidation of Tricoach, there was a capital loss of \$1,001.42 (Stip. 24, R. 58). In 1940, the Newells paid petitioner \$2,603.65 in addition to a like amount on advances (Stip. 23, R. 57). Such payment was not made by Tricoach Corporation so it is not governed in any way by Section 115(c) I.R.C., which applies only to distributions in liquidation. Since the liquidation distribution by Tricoach resulted in a capital loss, the three-year distribution plan provisions italicized in Section 115(c) I.R.C. as set forth in the Appendix, do not apply. Such three-year plan applies only to liquidation distributions by a corporation which results in a capital gain, not in a capital loss.

The additional consideration received by petitioner in 1940 and 1941 from the Newells did result in a capital gain on the entire transaction, but such payments did not constitute liquidation distributions from Tricoach Corporation. In other words, in 1940 the net results of the payments received by petitioner was as follows:

The \$25,500 liquidation distribution from Tricoach Corporation resulted in a community long-term capital loss of.....	(\$1,001.42)
The \$2,603.65 paid by the Newells resulted in a community long-term capital gain of..	2,603.65
Net community long-term capital gain.....	<u>1,602.23</u>
50% thereof to be taken into account.....	<u>\$ 801.12</u>
1/2 thereof to be reported by petitioner on his separate return .....	<u>\$ 400.56</u>

That this is exactly the same result as is contended for by petitioner is shown by the following:

Deductible loss on liquidation of Tricoach allowed petitioner by respondent (Stip. 24, R. 58) .....	(\$250.35)
Capital gain taken into account by petitioner for tax purposes, on his one-half of the payments made by the Newells (Stip. 27, R. 59) .....	650.91
Net capital gain .....	<hr/> \$400.56

It is petitioner's contention that this case is governed by the case of *David A. DeLong v. Commissioner*, 43 B.T.A. 1185. In that case it appeared that DeLong was a minority stockholder of American Broach & Machine Co. The remaining shares were owned by one Lapointe, individually or trustee, and his wife. Lapointe was also its president and general manager. In 1936, Lapointe negotiated with DeLong to have him exchange his stock in the American Company for 782 shares in the Sundstrand Machine Tool Co. in a proposed reorganization which Lapointe was negotiating. At one stage Lapointe offered to buy DeLong's stock for \$10,000.00 as he had to have DeLong's stock to complete the deal and was willing to pay him for it. DeLong decided he wanted \$30,000.00 in Sundstrand stock or its cash equivalent for his American stock, which Lapointe refused. They finally agreed that DeLong should receive 782 shares of Sundstrand stock or its equivalent in cash, at \$10.00 per share, and \$14,000.00 in cash to be paid by Lapointe. DeLong was not willing otherwise to go along with the reorganization. The reorganization was effected and DeLong received 782 shares of Sund-

strand stock, which was issued direct to him by the Sundstrand Company, and he received \$14,000.00 in cash from Lapointe.

The Commissioner, in auditing DeLong's return, held that the \$14,000.00 cash paid by Lapointe was not a part of the agreement of reorganization and that such payment constituted ordinary income taxable in full. DeLong claimed that the \$14,000.00 constituted part of the sales price of the capital asset and was therefore a capital gain. The Board of Tax Appeals held in favor of DeLong, stating at page 1187:

"Even though we assume, as urged by respondent, that petitioner participated in the plan of reorganization, and obtained from that source the Sundstrand stock in exchange for his American Co. shares, *it does not follow that the additional consideration he received for selling his stock was ordinary income as opposed to capital gain. There is no requirement of which we have been made aware that the sales price of an article cannot be paid in whole or in part by one other than the vendee.* It seems to us to be apparent from the record that petitioner disposed of his American Co. stock and received in exchange 782 shares of Sundstrand stock and \$14,000 in cash. 'That was the crux of the business' to petitioner, as it should be to us. *Griffiths v. Helvering*, 308 U.S. 355, 357. We see no reason why the total consideration should not be treated as the sales price of the stock, and the excess over cost as capital gain. *James Brown*, 10 B.T.A. 1036, 1054." (Italics supplied)

The respondent has acquiesced in such portion of



the decision as is apparent from the following 1941-1 Cum. Bull. 3:

“Acquiescence relates only to the issue, Is the \$14,000 cash received by the petitioner on February 6, 1936, from Francis K. Lapointe a part of the consideration of the petitioner’s American Broach & Machine Co. stock?”

That the *DeLong* case is similar to the instant case is shown by the following:

In both cases there was an exchange of stock, in the cited case for other stock, while in the instant case for the liquidation distribution; in both cases cash was paid, in the cited case by Lapointe, the main stockholder in American, while in the instant case by the Newells, the only other Tricoach stockholders; in both cases the additional remuneration was necessary to transfer a going business to a third party, Sundstrand in the cited case and Pacific Car & Foundry Co. in the instant case.

While it is true that in the cited case the exchange and cash payments were made at one time, while in the instant case the liquidating dividend and the payments by the Newells necessarily were not to be made until sometime in the future, nevertheless such future payments would not alter the principle, namely, that they were payments in exchange for a capital asset, and therefore capital gains when received.

In the recent case of *Margery K. Megargel v. Commissioner*, 3 T.C. 238, where petitioner had transferred stock but later instituted action to annul the transaction and for the recovery of the stock and the action was compromised and settled, the petitioner re-

ceiving cash upon an agreement to dismiss and execute general releases, including the claim in suit, petitioner having no other claim against the defendants, the Tax Court held that the amount was received upon the sale of capital assets and was therefore a capital gain, stating:

“It is now well settled that recognition of capital gain or loss does not depend upon the existence of usual or stereotyped forms of conveyance. It may rest upon involuntary sales through mortgage foreclosure. *Helvering v. Hamel*, 311 U.S. 504, *Electro-Chemical Engineering Co. v. Commissioner*, 311 U.S. 513; or upon loss of property through condemnation proceedings by the state or municipality. *Hawaiian Gas Products, Ltd. v. Commissioner*, 126 F.(2d) 4; *Commissioner v. Kieselbach*, 127 F.(2d) 359. In *Estate of James N. Collins*, 46 B.T.A. 765 (768) involving purchase of stock under fraudulent representations, later sale thereof and deduction of loss, and the compromise of suit filed thereon at a later date, we said:

“\* \* \* True, the decedent had already sold the stock in 1930 and 1931, but that fact does not require the conclusion that the transactions were completely closed at that time, because the decedent still maintained his right of action against the company’.”

It is admitted that the arrangements between Yost and the Newells were not the “usual or stereotyped form of conveyances” but they did provide a method whereby Yost was to receive for his Tricoach stock what he believed to be its approximate going-concern value.



That the arrangement was a friendly one is evidenced by the following testimony of Mr. Robert L. Newell on direct examination:

"A Well, Mr. Yost agreed with that amount that we fixed as the value of the business, and we entered into an agreement to pay him that. That is all there is to it.

"Q Did Mr. Yost make any statement in your presence as to whether or not he would sign the agreement with the Pacific Car and Foundry Company unless he got additional consideration?

"A Mr. Yost did not, because he never had to; he knew we would never make an agreement with the Pacific Car & Foundry Company without his consent." (R. 42)

And on Mr. Newell's cross-examination, in answer to the question as to what he meant by his testimony on direct that "before entering into any contract with Pacific Car & Foundry Company it was necessary to clear yourself with Mr. Yost," he said:

"A I mean that they—rather that we would have to get his agreement that we could do that; we had entered business with Mr. Yost, and we were going to stay there until the agreement was made, or until he agreed that we could accept some other proposal". (Tr. 28) (R. 143, 144)

The stipulated facts and exhibits and the testimony clearly show that Yost was willing to step aside so that the Newells could enter the Pacific Car and Foundry Co. organization, provided some agreement could be reached whereby Yost should ultimately receive what he believed to be the fair value of his Tricoach stock. He was willing to accept the proposals set forth in

Exhibits 8 and 9 to accomplish that, and “ ‘That was the crux of the business’ to petitioner as it should be to us,” *David A. DeLong v. Commissioner*, 43 B.T.A. 1185, or, to again quote Mr. Newell, “That is all there is to it” (Tr. 26) (R. 142).

Petitioners claim that the arrangements made are no different in practical effect than if petitioners had sold their stock to Pacific Car & Foundry Co. for its par value payable when Tricoach was liquidated, and as an inducement for such sale the Newells agreed to make the payments set forth in Exhibits 8 and 9.

**Agreements between Yost and Newells, Exhibits 8 and 9, did not constitute a joint venture.**

Before the Tax Court, respondent argued that the arrangement between petitioner and the Newells evidenced by Exhibits 8 and 9 constituted a joint venture and hence the profits thereof were ordinary income, taxable as such.

The Tax Court evidently was impressed with such argument because it stated:

“\* \* \* and in consideration of petitioner advancing to each of the Newells \$4,187.83, they agreed to share the profits which should be received from the Motor Coach Division of Pacific. The amounts in issue represented his share in the profits.

“In our opinion respondent is correct in designating the payment made by the Newells, to petitioner as the fruits of a joint venture. \* \* \*”  
R. 44, 45)

That such statement of the Tax Court is clearly erroneous, can easily be demonstrated.

In the first place, Exhibits 8 and 9 provide that each Newell agreed to pay to petitioner an amount equivalent to:

"One-third of all *compensation*, or damages in lieu thereof, not in excess of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), said first party shall receive or be entitled to receive from the Pacific Car and Foundry Company by reason of said contract as set forth in Exhibit 'A' attached, exclusive of the minimum salary of \$250.00 per month *and rental income* separately set forth in said contract.

"Payments to be made within three (3) days after first party shall receive an accounting and settlement of *his adjusted bonus compensation* from the Pacific Car and Foundry Company for each respective calendar year or fractional period." (R. 105, 108) (Italics supplied)

Also, Exhibit 7 provides:

"In addition to said minimum salary above mentioned, first party [Pacific] will pay to each of the second parties [Newells] one-sixth ( $1/6$ ) of the 'profits' of the business of said Motor Coach Division earned during said term of years. \* \* \*" (R. 83, 84)

Such provisions make it clear that the share of the "profits" was considered by all parties to be compensation for the services of the Newells to the Motor Coach Division of Pacific, and the Newells were not parties to a joint venture with Pacific. They were simply department managers of Pacific with their compensation, above \$250 per month, contingent upon the success of the business. If the present Withholding Tax had been in effect in those years it is incon-



ceivable that the respondent would rule that such "adjusted bonus compensation" when payable to the Newells was not subject to the Withholding Tax because it was their share in the profits of a joint venture.

Secondly, if there were a joint venture between petitioner and the Newells, why were separate agreements entered into with each Newell (Exhibits 8 and 9)?

Thirdly, if the advances to the Newells to enable them to purchase the machinery from Tricoach, was a capital investment on petitioner's part in a joint venture, is it consistent with such idea that the *rental income* from such machinery was to be excluded from the share of the amount of compensation to be paid by the Newells to petitioner?

In the fourth place, said Exhibits 8 and 9, considered with the testimony of Yost (R. 132, 133, 138) and Robert L. Newell (R. 141-144), as to the reason of making the payments to petitioner, certainly negatives any idea of a joint venture.

The situation was simply that the Newells recognized that petitioner was entitled to receive from them \$25,000 as his share of the value of the going business of Tricoach that he would lose if Tricoach went out of business. That they did not have the money to pay him outright, is easily surmisable when it is considered that they had to borrow the money from petitioner to buy the machinery from Tricoach. Exhibits 8 and 9 clearly indicate that the only way they could pay petitioner was out of any "adjusted bonus

compensation" they might receive from Pacific, and that is what actually happened, but the fact that they did carry out their agreements with petitioner did not make such arrangement a joint venture.

In *James Brown, et al. v. Commissioner*, 10 B.T.A. 1036, 1045, 1054, it was held that payments made by one Bache of 15% of back salary payments when received by him, which he had agreed to pay to Brown as an inducement to Brown to purchase certain stock in a corporation in which Bache was the majority stockholder, did not constitute taxable income to Brown, but amounted to a reduction in the cost of the stock to Brown. The arrangement in that case was no more a joint venture than is that of the instant case.

A consideration of the whole picture can lead to no other conclusion than that the payments received by petitioner from the Newells were received in connection with his consent to accept from Tricoach Corporation the liquidation value of his stock. and thus were capital gains.

## II.

**The Correct Deficiency in Petitioner's Income Tax for 1940 is \$2.57 and There is No Deficiency for 1941. (Assignment of Error II).**

If petitioner's contentions that the payments received by him from the Newells are capital gains and not ordinary income, then it was stipulated that the correct deficiency for 1940 is \$2.57 (Stip. 29, R. 59; Opinion R. 39) and that there is no deficiency for the year 1941 (Stip. 32, R. 60; Opinion R. 40).



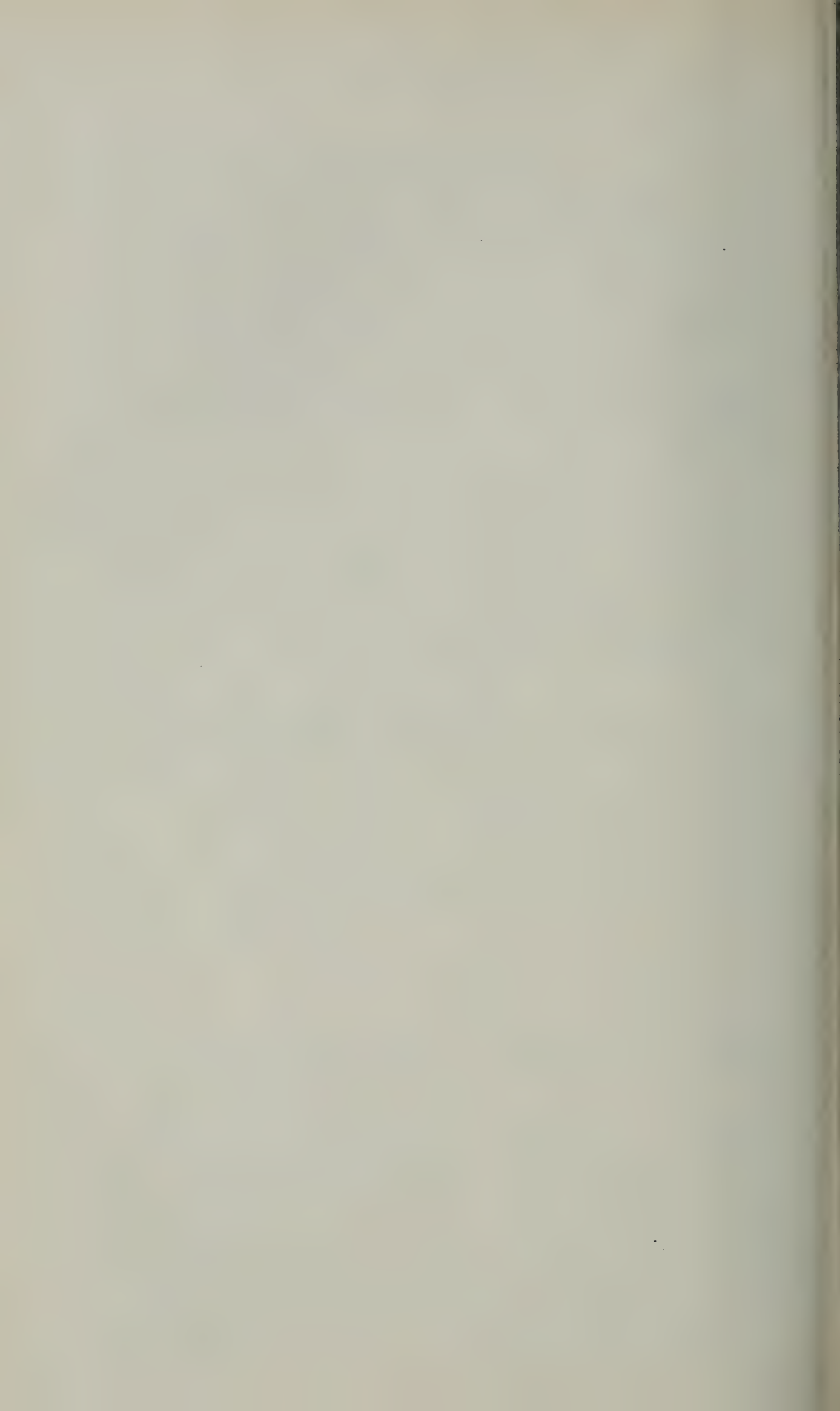
**CONCLUSION**

It is respectfully submitted that the Tax Court erred in holding that the payments received by petitioners from the Newells constituted ordinary income; that they should be held to be capital gains by this Court and the decision of the Tax Court reversed with instructions to enter the correct deficiency in accordance with the stipulation.

Respectfully submitted,

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## APPENDIX

### Sections 115 and 117, Internal Revenue Code

#### "SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

"(c) Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. *Despite the provisions of section 117, the gain so recognized shall be considered a short-term capital gain, except in the case of amounts distributed in complete liquidation. For the purpose of the preceding sentence, 'complete liquidation' includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding, from the close of the taxable year during which is made the first of the series of distributions under the plan, (1) three years, if the first of such series of distributions is made in a taxable year beginning after December 31, 1937, or (2) two years, if the first of such series of distributions was made in a taxable year beginning before January 1, 1938. \* \* \**

(Note: The above provision was in effect during 1940 and 1941, but the italicized portion was eliminated by the 1942 Revenue Act amendment of said section, which amendment was not retroactive.)

“SEC. 117. CAPITAL GAINS AND LOSSES.

“(a) Definitions.—As used in this chapter—

“(1) Capital Assets.—The term ‘capital assets’ means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1);

“(2) Short Term Capital Gain.—The term ‘short-term capital gain’ means gain from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such gain is taken into account in computing net income;

\* \* \* \* \*

“(4) Long-Term Capital Gain.—The term ‘long-term capital gain’ means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing net income;

“(5) Long-Term Capital Loss.—The term ‘long-term capital loss’ means loss from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such loss is taken into account in computing net income;

\* \* \* \* \*

“(b) Percentage Taken Into Account.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

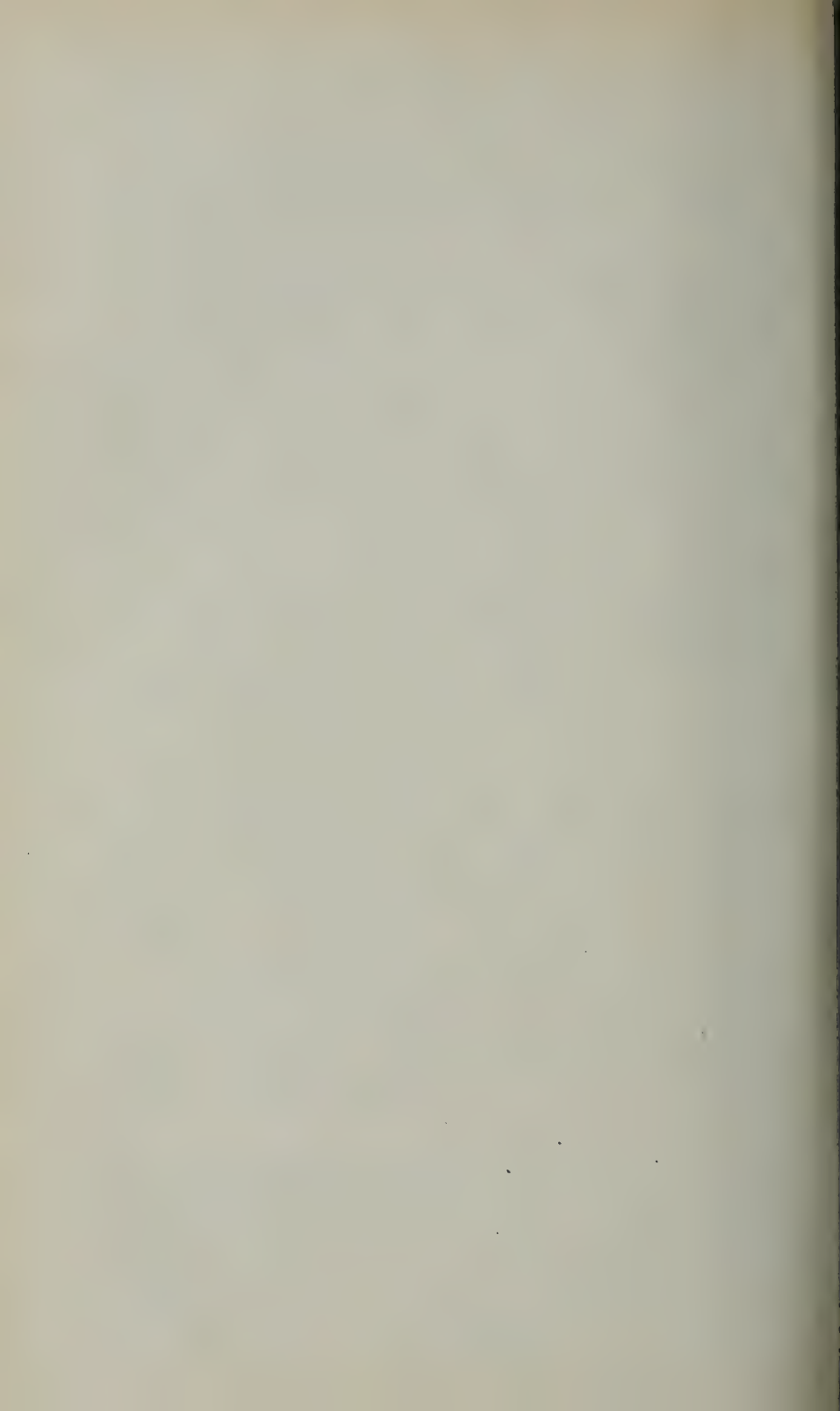
'100 per centum if the capital asset has been held for not more than 18 months;

66  $\frac{2}{3}$  per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

"50 per centum if the capital asset has been held for more than 24 months."

\* \* \* \* \*





No. 11155

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**GEORGE W. YOST, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

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**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

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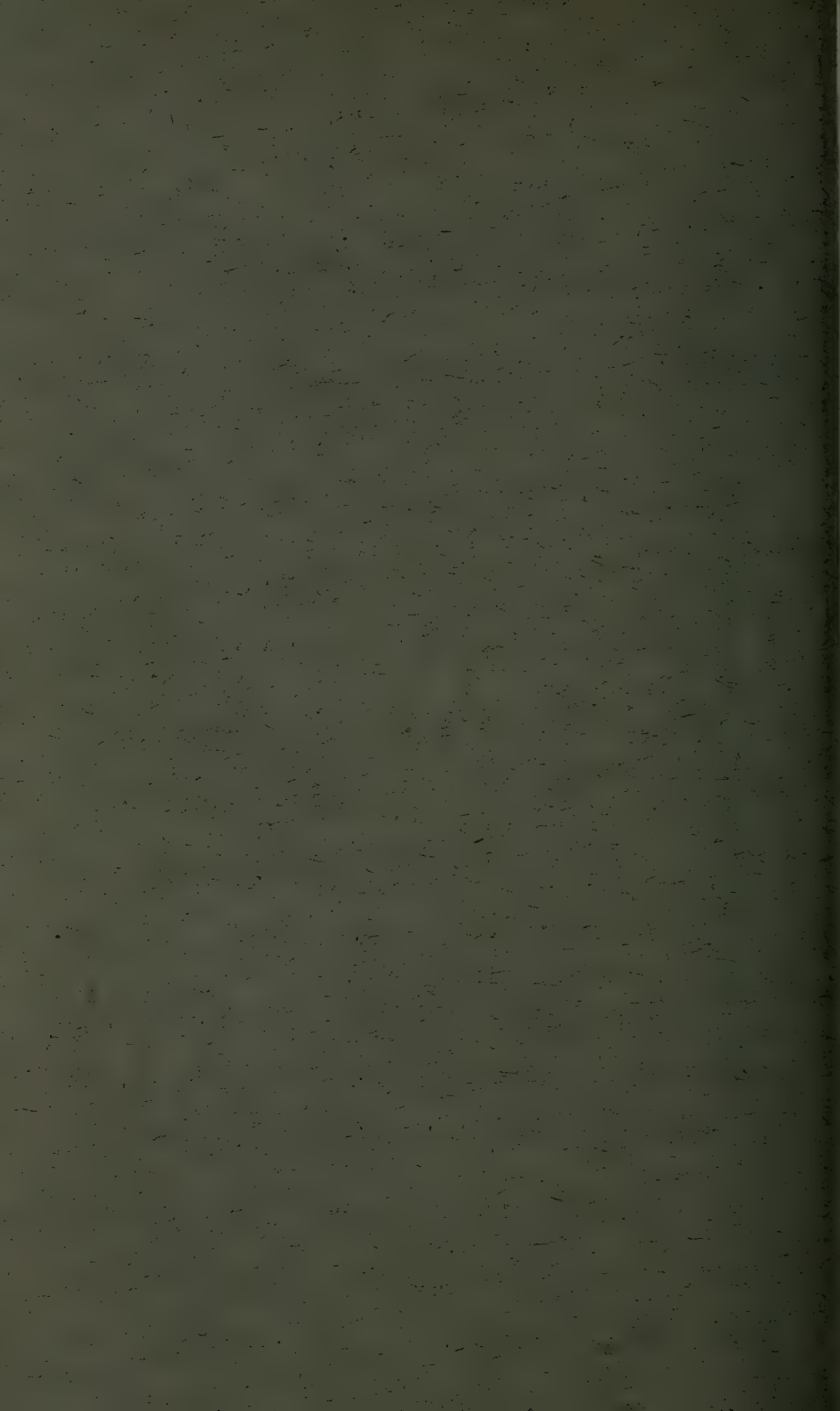
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FILED

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(I)





# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11155

GEORGE W. YOST, PETITIONER

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

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## **OPINION BELOW**

The only previous opinion in this case is the opinion of the Tax Court (R. 27-45), reported at 5 T. C. 140.

## **JURISDICTION**

This appeal involves deficiencies in federal income tax assessed against George W. Yost, hereafter referred to as the taxpayer, for the years 1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70. (R. 3-4, 28.) In a companion appeal to this Court by Juanita Yost, wife of the taxpayer, this Court has entered an order (R. 174-176) permitting the filing of an abbreviated record on appeal in the latter case, dis-

pensing with the printing thereof, and providing for the entry of judgment therein in accordance with the final decision in the instant case.

Under date of March 23, 1944, the Commissioner of Internal Revenue, pursuant to Section 272 (a) of the Internal Revenue Code, mailed a statutory notice of deficiency to the taxpayer proposing to assess against him the deficiencies shown above. (R. 16-21.) Within the time allowed therefor the taxpayer filed a petition with the Tax Court for review of the Commissioner's determination. (R. 3-16.) The Tax Court, after hearing in due course, entered its decision under date of May 28, 1945, affirming the Commissioner's determination. (R. 45-46.) Under date of August 24, 1945, the taxpayer filed with the Clerk of the Tax Court, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, a petition for review by this Court of the decision entered by the Tax Court on August 24, 1945. (R. 161-173.)

#### QUESTION PRESENTED

Whether one-half of the net amounts of \$2,603.65 and \$12,799.99 received by the taxpayer and his wife in 1940 and 1941, respectively, from Richard B. Newell and Robert L. Newell pursuant to certain agreements shown by the record constituted ordinary income of the taxpayer within the meaning of Section 22 (a) of the Internal Revenue Code or constituted long-term capital gain from the sale or exchange of capital assets within the meaning of Section 117 (a) of the Code.

## STATUTE INVOLVED

## Internal Revenue Code:

## SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

(26 U. S. C. 1940 ed., Sec. 22.)

## SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) *Capital assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would probably be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1);

(2) *Short-term capital gain*.—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not

more than 18 months, if and to the extent such gain is taken into account in computing net income;

\* \* \* \* \*

(4) *Long-term capital gain.*—The term long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing net income;

\* \* \* \* \*

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66 $\frac{2}{3}$  per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 117.)

#### STATEMENT

This appeal involves deficiencies in federal income taxes asserted against the taxpayer for the years 1940 and 1941 in the respective amounts of \$75.44 and \$1,071.70. (R. 3-4, 28, 47.) At all times material to this proceeding the taxpayer and Juanita Yost were married and living together as husband and wife at Edmonds, Washington. They filed separate income



tax returns for the years involved with the Collector of Internal Revenue for the District of Washington, each reporting one-half of the community income. (R. 46, 151-159.) The Commissioner determined like deficiencies against each spouse as a result of the adjustments here involved and their separate appeals to the Tax Court were heard and decided together by that court. (R. 28, 46.) Separate appeals were taken from the Tax Court's decisions, but by order of this Court only the record in the taxpayer's case was printed, and the decision in this case will be controlling in the wife's appeal. (R. 174-176.) The deficiencies in both cases arise out of the same transactions and the only question involved is whether amounts received by the marital community in 1940 and 1941 from Richard B. Newell and Robert L. Newell, pursuant to certain agreements theretofore entered into between the parties, constituted ordinary income or capital gains from the sale of capital assets. (R. 28.) The cases were submitted to the Tax Court upon a stipulation of facts and documentary exhibits, plus oral testimony of the taxpayer and others. (R. 46-159.) The Tax Court sustained the Commissioner's determination (R. 27-46) and this appeal followed (R. 161-173).

For some time prior to the taxable years involved, the taxpayer had been, and still is, engaged in the bus passenger transportation business in suburban Seattle as part owner and general manager of Suburban Transportation System. For a number of years prior to 1935 Richard B. Newell had been a draftsman



and chief engineer for Heiser's, Inc., manufacturers of bus and truck bodies at Seattle, and Robert L. Newell had been engaged in the sale throughout the Pacific Northwest of bus and truck bodies manufactured by Wentworth and Irwin of Portland, Oregon. For some time prior to January 28, 1935, the Newells had discussed with the taxpayer the formation of a new company to manufacture bus and truck bodies. As a result they organized Tricoach Corporation, a Washington corporation with its principal office at Seattle, on January 28, 1935, with an authorized capitalization of \$50,000 represented by 1,000 shares of \$50 par value common stock. Thereafter, and at all times material here, these three individuals owned all of the outstanding stock of the corporation and were its only officers and directors. Robert Newell was president and sales manager. Richard Newell was vice-president and general sales manager. The taxpayer was secretary. The Newells each received an agreed monthly salary, and in addition thereto they and the taxpayer were each to receive adjusted compensation equal to one-third of the annual net profits of the corporation in excess of an amount necessary to pay eight per cent dividends on the outstanding stock. (R. 28-30, 47-49.)

Only a part of the stock of Tricoach Corporation was issued at the time of organization, but by the end of 1937 all of the stock was issued and outstanding. At that time the taxpayer owned 510 shares, fully paid, or 51 percent of the outstanding stock, which had a cost basis to him for tax purposes of \$26,-

501.42, and the two Newells owned the balance of the stock in equal amounts. (R. 30-31, 38, 51, 53, 58.)

As of November 1, 1937, the taxpayer and the two Newells formed a partnership under the name of Tricoach Sales Company to carry on the general business activities pertaining to the wholesale and retail distribution of motor vehicles and trading in commercial paper relating to such transactions. The taxpayer contributed \$20,000 and had a 50 percent interest, while the Newells contributed \$10,000 each and each had a 25 percent interest. (R. 31-32.)

In March, 1936, Heiser's, Inc. (former employer of Richard Newell), made an assignment for benefit of creditors and during 1936 all of its machinery and equipment was sold to Pacific Car and Foundry Company, was installed in the latter's Renton plant, and a bus body manufacturing plant was started in competition with Tricoach Corporation which resulted in considerable loss to Pacific Car and Foundry Company for 1936 and 1937. For several months in 1938, Pacific negotiated with the taxpayer and the Newells for the purpose of accomplishing a merger or consolidation, or working out of some method to eliminate the competition of Tricoach Corporation and to secure the services of the two Newells to manage the production and sales of the motor coach division of Pacific Car and Foundry Company. The arrangement finally worked out, which is reflected in agreements made a part of the record (pp. 80-115) and fully carried out contemplated leasing by Tricoach Corporation of its machinery and equipment to the

Newells for ten years, with an option to them to purchase it before December 31, 1938, at its depreciated book value; the Newells then were to sublease to Pacific Car and Foundry Company all of the Tricoach Corporation machinery and equipment for seven and one-half years from October 1, 1938, and it was to be moved at Pacific's expense to the Renton plant. Pacific was to operate its motor coach division for seven and one-half years from October 1, 1938; to employ the Newells for that period at a minimum salary of \$250 per month each and, in addition thereto, to pay each of the Newells one-sixth of the profits of the business of the motor coach division earned during the term of the agreement; and Pacific was to purchase, as needed, for cash at then market prices, all of Tricoach Corporation's materials inventory. (R. 32-33.)

This master agreement (R. 80-104), signed by all the parties (R. 104), and frequently referred to in the opinion of the Tax Court as the four-party agreement, was executed August 3, 1938. At the same time the taxpayer and each of the Newells entered into identical separate subsidiary agreements (R. 104-111) which recited, among other things, that (R. 105, 108-109):

In Consideration that the second party [the taxpayer] shall consent to and enter into a certain contract between the Pacific Car and Foundry Company, a corporation, the Tricoach Corporation, a corporation, et al, \* \* \* [the four-party agreement] and shall, on or before December 31, 1938, advance to first party the sum of Forty-one Hundred Eighty-seven

83/100 (\$4,187.83) Dollars, without interest, to be used by first party for the purpose of acquiring joint ownership of the machinery and equipment to be sub-leased to the Pacific Car and Foundry Company as set forth in \* \* \* [the four-party agreement], the first party hereby agrees to pay unto second party an amount equivalent to;—

one-third ( $\frac{1}{3}$ ) of all compensation, or damages in lieu thereof, not in excess of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), said first party shall receive or be entitled to receive from the Pacific Car and Foundry Company by reason of said contract as set forth in Exhibit "A" attached, exclusive of the minimum salary of \$250.00 per month and rental income separately set forth in said contract.

Payments to be made within three (3) days after first party shall receive an accounting and settlement of his adjusted bonus compensation from the Pacific Car and Foundry Company for each respective calendar year or fractional period.

Each agreement between the taxpayer and the Newells further provided that, in the event that all or any part of the machinery and equipment involved should be sold by the Newells, one-fourth of the net proceeds derived from the sale should be paid to the taxpayer and applied in liquidation of the \$4,187.83 loan, and that one-half of all other payments made pursuant to the agreement would be applied in liquidation of the loan until it should be paid in full. In the event that either (Richard or Robert) should



terminate his employment with Pacific Car and Foundry Company, either voluntarily or by death, the unpaid balance was to become due and payable with an option in the first party or his legal representatives to assign to the taxpayer an undivided one-fourth interest in the machinery and equipment, together with the proportionate share of rental income to be subsequently earned. In the event the named Newell should continue in the employ of Pacific for the full seven and one-half years, then the taxpayer agreed to waive and forgive any unpaid balance on the loan of \$4,187.83. (R. 34-35, 104-111.)

At a joint meeting of stockholders and directors of Tricoach Corporation held on August 2, 1938, the day preceding execution of the above agreements, a resolution was adopted to suspend the manufacturing operations of the corporation on or about October 1, 1938; to gradually liquidate its affairs; to enter into the proposed agreement with Pacific (the four-party agreement); and to enter into a lease agreement with the Newells for lease of the corporation's manufacturing machinery and equipment with an option in them to purchase on or before December 31, 1938, for cash at the depreciated book value. An agreement, signed by all of the stockholders of Tricoach Corporation under date of August 2, 1938, restricting the sale or transfer of shares of stock of the corporation to persons other than the present stockholders or members of their families, was received and filed as an appendix to the minutes of this joint meeting. (R. 35-37, 111-115.)



On June 26 1940, the taxpayer received \$25,500 (an amount equal to the par value thereof) from Tricoach Corporation and signed a receipt stating in part (R. 38, 116):

In event the Tricoach Corporation shall resume its business activities the undersigned hereby agrees to return the funds thus advanced; but, if business activities are not resumed, the funds thus advanced shall, upon dissolution, be applied in settlement of any liquidating dividends that may be declared.

There is nothing in the record to show that Tricoach Corporation ever was liquidated, or that the taxpayer ever surrendered or transferred his 510 shares of stock therein. In fact, the contrary appears to be true. As stated above, the taxpayer's 510 shares of stock had a cost basis, for income tax purposes, of \$26,501.42, and the Commissioner in determining deficiencies against the taxpayer and his wife for 1940, allowed as a deduction to each for a long-term capital loss one-half of the difference on the theory that the \$25,500 received from the corporation represented a liquidating dividend. (R. 38.)

In 1940 the taxpayer received from the Newells, under the agreements mentioned above, the net sum of \$2,603.65 after deduction of the amounts applied on loans to them, and in 1941 he received the net sum of \$12,799.99 (reflected as \$12,800 in the returns (R. 156, 158) and deficiency notices (R. 21)) after deduction of the balance of the loans to them, which amounts the taxpayer and his wife reported as gain upon the sale or exchange of capital assets held for more than 18

months and therefore only one-half of which was includible in gross income for federal income tax purposes. In auditing their returns for the years involved, the Commissioner treated those amounts as ordinary income taxable in its entirety to the two spouses, and in his notices of deficiency explained that the amounts in question were not received from the sale or exchange of capital assets as defined by Section 117 of the Internal Revenue Code, and were not distributed by a corporation in cancellation or redemption of all of its capital stock in accordance with a plan of liquidation, as contemplated by Section 115 (c) of the Internal Revenue Code. (R. 18, 21.) The Tax Court sustained the Commissioner's determination. (R. 27-45.)

#### SUMMARY OF ARGUMENT

The taxpayer and his two associates owned all of the stock in Tricoach Corporation. His two associates contracted to give their services to a competing concern under an arrangement, agreed to by the taxpayer, under which the taxpayer financed the sale of Tricoach Corporation's machinery and equipment to the competing concern, he and Tricoach Corporation agreed not to engage in competition for the term of the arrangement, and in return he was to receive repayment of the loans advanced plus an agreed share of the profits to be earned by his associates under the new arrangement. The amounts received by the taxpayer under this arrangement constituted income for the years here involved. The amounts involved did not represent payments for the sale or exchange of

capital assets within the meaning of the Internal Revenue Code. The taxpayer did not sell or exchange his stock in the Tricoach Corporation. The payments received by him from his former associates, over and above the repayment of amounts loaned to them by the taxpayer, represented his share in the profits of the new undertaking and were taxable as ordinary income rather than capital gains.

#### ARGUMENT

**The Tax Court did not err in holding that the amounts received by the taxpayer under the facts of this case constituted ordinary income rather than capital gain**

The Internal Revenue Code imposes a tax at specified rates upon the net income of every individual for the years here involved. "Net income," for purposes of the tax, is defined by Section 21 of the Code as the gross income computed under Section 22, less the deductions allowed by Section 23. Section 22 (a) of the Code, *supra*, defines gross income to include "gains or profits and income derived from any source whatever." Certain exceptions are made by the statute for income derived from specified sources or under specified circumstances. In this case the taxpayer is relying upon the exception contained in Section 117 of the Code, *supra*. That section, after defining "capital assets," "long-term capital gain," and other terms pertinent to the computation of tax liability involving gains or losses realized upon the sale or exchange of "capital assets," provides, in so far as material here, that if a capital asset has been held for more than 24 months, only 50 per centum of the gain upon the sale

or exchange thereof shall be taken into account in computing net income.

In this case there is no disagreement over the amount of income or gain received by the marital community during the years involved, and there is no question that the capital asset—if it should be held that the profit involved was realized from the sale or exchange of a capital asset—was held for more than two years.

The whole burden of the taxpayer's contention in this case is stated in the headnote to his argument (Br. 12), where he asserts that the amounts involved were "Amounts Derived from the Sale or Exchange of Capital Assets and thus Constituted Long-Term Capital Gains to the Marital Community." The premise would be sound if substantiated by the facts. But the first paragraph of the taxpayer's argument (Br. 12) dispels any illusion as to the correctness of his position. He states that the sole question in the case is whether the net amounts received from the Newells during the years involved, "the main consideration for which was" (Br. 12):

IN CONSIDERATION that the second party [Yost] shall consent to and enter into a certain contract between the Pacific Car and Foundry Company, a corporation, Tricoach Corporation, a corporation, *et al*, a copy of which is attached hereto and marked "Exhibit A" \* \* \*

were capital gains as contended by the taxpayer, or ordinary income as held by the Commissioner and the Tax Court.



The rest of the argument (Br. 13-28) is anti-climax because the above statement of the question involved is in itself an admission that the amounts involved were not received by the taxpayer in connection with the sale or exchange of a "capital asset" as that term is defined in the Internal Revenue Code. Furthermore, it is difficult to ascertain from the argument as a whole just what the taxpayer considers the "capital asset" which was sold or exchanged.

At the outset the taxpayer asserts that his shares of stock in Tricoach Corporation represented two elements of value—51 per cent of the value of net tangible assets of the corporation and 51 per cent of the intangible or going concern value of its business. (Br. 13-14.) He apparently admits that the distribution of \$25,500 received from the corporation in 1940 represents the net value of the tangible assets (Br. 17-19), and presumably contends that the amounts received from the Newells was in payment for the intangible value of the assets of the corporation. The Tax Court aptly labels this argument as "ingenious but unsound." (R. 41.) There is no evidence in the record to show what value, if any, the intangible assets of the corporation had. But what is more important, it seems to be well settled that intangibles, such as good will, are incidental to the business from which they grew and cannot be severed or carved out of the net value of the business and disposed of independently of the business as a going concern. In *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 446, the Supreme Court said that undoubtedly good



will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term, but that it is tangible only as an incident connected with a going concern or business having a locality or name, "and is not susceptible of being disposed of separately." Compare *Pflegghar Hardware Specialty Co. v. Blair*, 30 F. 2d 614 (C. C. A. 2d); *Betts v. United States*, 62 C. Cls. 1, certiorari denied, 273 U. S. 762; *Washburn v. National Wall-Paper Co.*, 81 Fed. 17, 20 (C. C. A. 2d). In *Dodge Brothers v. United States*, 118 F. 2d 95, the Circuit Court of Appeals for the Fourth Circuit said (p. 100):

Good will cannot be carved out of a business and sold independently of the going concern; for its tangibility and its value exist only to the extent that such tangibility and such value are connected with a going business.

In this case neither Pacific Car and Foundry Company nor the Newells acquired the right to use the name or place of business of Tricoach Corporation. The machinery and equipment was first leased to the Newells, and later sold to them, and was removed from Seattle to the Renton plant where it was installed as a part of the equipment of the motor coach division of Pacific. It thereby definitely lost its identity as machinery and equipment of Tricoach Corporation. Obviously no good will or other intangible value of the business of Tricoach Corporation was transferred to or followed the machinery to Renton. The principal intangible thing, if it can be so termed, which Pacific Car and Foundry Company or the Newells received from the taxpayer and

Tricoach Corporation was their agreement not to compete during the term of the four-party agreement. Finally, since this arrangement with Pacific Car and Foundry Company was only for a limited period, and since the corporate existence of Tricoach Corporation was maintained, it would be preposterous to say that the latter had sold its good will.

In this connection it should be noted that amounts received as compensation for agreements to refrain from competition under such circumstances are taxable as ordinary income rather than as capital gains. In *Salvage v. Commissioner*, 76 F. 2d 112 (C. C. A. 2d), affirmed, 297 U. S. 106, the court held that payment for a covenant not to engage in a competing business was income. In discussing this point the court stated (pp. 113-114):

The contract under which the petitioner purchased the 1,500 shares of Viscose stock stated that the consideration for selling it at less than its real value was the petitioner's covenants relating to the option and to his refraining from engaging in a competing business. Compensation paid for refraining from labor would seem to be taxable income no less than compensation for services to be performed. For example, a farmer who is paid for voluntarily refraining from raising hogs receives, in our opinion, income. Certainly it is neither a capital payment nor a gift. The statutory definition of gross income is exceedingly broad. Section 213, Revenue Act 1921 (42 Stat. 237). We cannot avoid the conclusion that a payment for a covenant not to engage in a certain busi-

ness should be deemed "income" of the recipient of the payment.

In *Beals' Estate v. Commissioner*, 82 F. 2d 268 (C. C. A. 2d), affirming 31 B. T. A. 966, the court held that the value of stock received by the taxpayers in exchange for their several agreements not to engage in a competing business constituted income. As an alternative, the taxpayers there contended that the shares were received in exchange for property (presumably their right to engage in business), and that the gain realized upon the transaction should be taxed upon disposition of the capital asset. This contention was rejected, the court pointing out that even if the right to engage in business be considered property, it was not disposed of in exchange for stock. See also *Cox v. Helvering*, 71 F. 2d 987 (App. D. C.), in which the court held that the amount paid by the purchaser of a corporate business for the agreement of the stockholders to refrain from entering a competing business for a limited period constituted taxable income whether paid to the corporation or its principal stockholder, and *Estate of Hyde v. Commissioner*, 42 B. T. A. 738, where it was held that an amount paid to the decedent under an agreement which, among other things, contained her covenant not to enter into business in competition with certain corporations constituted ordinary income.

The taxpayer admits that the amounts received from the Newells for the years here involved were not received in exchange for his Tricoach Corporation stock. In fact, he makes a special point of the fact that the



payment of \$25,500 from Tricoach Corporation in 1940 was all he received as a liquidating dividend on his stock. (Br. 17-19.) The reason for this argument is clear. Under the provisions of section 115 (c) of the Internal Revenue Code applicable to the years here involved, the gain derived from a liquidating dividend was to be treated as a short-term capital gain—or ordinary income—unless the distribution was a distribution in “complete liquidation” pursuant to a plan which required liquidation to be completed within a period of three years. The arrangement under which the taxpayer received the payments here involved did not satisfy this three year requirement so the amounts received from the Newells necessarily would have to be taxed as ordinary income if considered as a part of the distribution by the corporation in complete liquidation of its stock.

There may be some question whether the \$25,500 received from Tricoach Corporation in 1940 actually constituted a liquidating dividend inasmuch as the corporation was not dissolved and the taxpayer continued to hold his stock. This question, however, is not involved in this case. But the taxpayer’s admission that the only liquidating dividend he received was the \$25,500 received from the company emphasizes the fact that the amounts received from the Newells were not received as payment for the sale or exchange of a capital asset.

The taxpayer relies entirely upon one decision of the Board of Tax Appeals and one decision of the Tax Court (Br. 20-25), neither of which is remotely ap-

plicable to the case at bar, and both of which were distinguished by the Tax Court in its opinion (R. 42-43). In both cases the payments in question clearly were made for a capital asset. But in this case the taxpayer has failed to point to a capital asset which he parted with as consideration for the payments received from the Newells. On the other hand, it is clear from the record as a whole that he insisted upon receiving a share in the Pacific Car and Foundry Company profits to be realized by the Newells because he had advance funds for them to finance the venture, had agreed to not engage in competition during the period of their agreement with Pacific, and was foregoing all possibility of realizing profit in the future from business operations by Tricoach Corporation, of which he held a majority of the stock. His insistence upon this arrangement where he could participate in the profits of Pacific Car and Foundry Company is both understandable and reasonable under the circumstances. But this does not make the payments received as a result of this new arrangement capital gains. They are not payments received for the sale or exchange of capital assets.

The taxpayer takes the position that the arrangement under which he received the amounts here involved was for all practical purposes the same as if he had sold his Tricoach Corporation stock for its par value and as an inducement for such sale the Newells had agreed to pay the additional amounts here involved. (Br. 25.) Thus he seeks to show the case is similar to *DeLong v. Commissioner*, 43 B. T. A. 1185.



No doubt the taxpayer insisted upon this additional amount because he felt that his stock in Tricoach Corporation, plus the amounts advanced to the Newells, was worth more than he could hope to collect upon liquidation of Tricoach Corporation. But his tax liability for the years involved must be determined upon the basis of what actually was done, not what he could have done. He did not part with his Tricoach Corporation stock, and the evidence indicates that he wanted to retain this stock as well as preserve the corporation because of the possibility of resuming the business operations of the corporation if the arrangement with the Newells and Pacific Car and Foundry Company should be abandoned or prove unprofitable.

Finally, the taxpayer takes exception to that part of the Tax Court's opinion (R. 45) classifying the payments received from the Newells in 1940 and 1941 as the fruits of a joint venture (Br. 25-28). But the Tax Court's characterization of the payments is correct. It is true that the taxpayer did not acquire any direct interest in either the stock or the assets of Pacific Car and Foundry Company. But he advanced the money needed by the Newells to purchase the machinery and equipment of Tricoach Corporation, he agreed to refrain from competition during the period of their agreement with Pacific Car and Foundry Company, and in return he was to receive from each the amounts agreed upon. His active participation in the venture was not necessary to make the arrangement a joint venture. Furthermore, the situation is not changed by the fact that the taxpayer entered into

a separate contract with each of the Newells instead of making it a three-party undertaking. Two parties can enter into a joint venture for their mutual profit and benefit. That was in fact the substance of the taxpayer's arrangement with each of the Newells.

#### CONCLUSION

The decision of the Tax Court is correct. It is supported by the facts and the law and should be affirmed.

Respectfully submitted,

SEWALL KEY,  
*Acting Assistant Attorney General.*

A. F. PRESCOTT,  
FRED E. YOUNGMAN,  
*Special Assistants to the Attorney General.*

JANUARY, 1946.

No. 11179

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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F. S. LACK,

Appellant,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a corporation,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

DEC 22 1945

PAUL P. O'BRIEN,<sup>1</sup>  
CLERK



No. 11179

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Southern District of California, Central Di-  
vision

In Equity  
No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COM-  
PANY, a corporation,

Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY,  
Ltd., a corporation,

Defendants

In Equity  
No. 84 S. D. Civil O'C

F. S. LACK,

Plaintiff,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a corporation,

Defendant.

### FINAL DECREE

The above entitled cause, No. 1301 O'C Civil, Central Division, having been filed in this court, and the above entitled cause, No. 84 O'C Civil, Southern Division, having been commenced in the Superior Court of the State of California in and for the County of Imperial, No. 19637, and there-  
after removed to this court, and the said two causes



having been consolidated and tried together before the Hon. J. F. T. O'Connor, Judge; and a Final Decree thereupon having been filed and entered on October 31st, 1941, in Civil Order Book for the Central Division, No. 7 at page 235 et seq., and in Civil Order Book for the Southern Division, No. 1 at page 482 et seq.; and, pursuant to said Decree, inter alia, the court having ordered that the \$28,-067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, in [2] case No. 1301 O'C Civil, Central Division, on January 29th, 1941, be paid to the Western Loan and Building Company, a corporation, of which said sum of \$28,-067.87, less clerk's fees of one per cent, amounting to \$280.68, or \$27,787.19, was paid by the clerk of the District Court to the Western Loan and Building Company, a corporation, on November 4th, 1941; and

The said F. S. Lack, the defendant in said cause No. 1301, O'C Civil, Central Division, and plaintiff in said cause No. 84 O'C Civil, Southern Division, having appealed from a part of said Decree, and from the order denying his Motion for a new trial, dated and filed March 13th, 1942, to the Circuit Court of Appeals for the Ninth Circuit, to the extent and as more fully set forth in the said Notice of Appeal, dated and filed May 1st, 1942; and the said United States Circuit Court of Appeals having rendered its Opinion, filed April 9th, 1943, in the said court, and reported in 134 Fed. Supp. 1017, and having made its Decree reversing that part of the said judgment appealed from, and

directing the entry of judgment in this court; and the said Mandate of said United States Circuit Court of Appeals for the Ninth Circuit in these two causes bearing date May 29th, 1943, having been duly transmitted to this court, and having been filed and spread on the minutes of this court on the 3rd day of June, 1943, decreeing that that part of the judgment of the said District Court in these two causes, so far as appealed from, be reversed with costs in favor of the appellant, F. S. Lack, and against the appellee, Western Loan and Building Company, a corporation, with directions to the District Court to enter judgment awarding to Western Loan and Building Company, a corporation, the sum of \$19,250.00 of the \$28,067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, and awarding F. S. Lack the sum of \$8,817.87 of the said \$28,067.87, and requiring the Western Loan and Building Company, a corporation, to convey to F. S. Lack the [3] Hotel Dunlack Building in Brawley, California, the land on which the Building stood, and affirming that part of the District Court's decree requiring the Western Loan and Building Company, a corporation, to convey and transfer to F. S. Lack all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building, and that the appellant, F. S. Lack, recover against the appellee, Western Loan and Building Company, a corporation, for his costs expended on appeal and taxed by the Circuit Court of Appeals, the sum of \$1122.97; and

This Court having made its interlocutory decree dated December 20, 1943, entered and docketed December 20, 1943, in Book CO 22 at page 451, and having by orders denied all motions by F. S. Lack to amend or re-settle said decree and for other relief;

And said F. S. Lack having appealed from said interlocutory judgment and said orders in the manner and to the extent set forth in the notice of appeal dated and filed March 19, 1944, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said United States Circuit Court having rendered its opinion filed December 30, 1944, in said Court, and having made its decree dismissing said appeal and the mandate of said United States Circuit Court in said causes bearing date of December 30, 1944, having been transmitted to this Court by the United States Circuit Court and said mandate having been duly spread on the minutes of this Court on the 25th day of June, 1945;

And the Court having made Findings of Fact on the issues presented and Conclusions of Law,

Now, upon motion of Henry S. Dottenheim, attorney for F. S. Lack, [4]

It Is Ordered, Adjudged, and Decreed:

1. That the judgment, Findings of Fact and Conclusions of Law herein dated October 31, 1941, be and they are hereby in all respects vacated, set aside, and annulled.

2. That the decree of this Court herein, bearing date of October 31, 1941, and entered October 31,

1941 and docketed October 31, 1941, in Book CO 7, page 235, and Book CO 1, page 482, is hereby insofar as appealed from be and it is in all respects vacated, set aside, and annulled.

3. That the interlocutory decree dated December 20, 1943, entered December 20, 1943, and docketed December 20, 1943, in Book CO 22, page 451, be and it is hereby in all respects vacated, set aside, and annulled.

4. That the said Pearl Assurance Company, Ltd., a corporation, having heretofore deposited with the Clerk of this Court on January 29, 1941, in cause 1301 C. Civil, Central Division, the sum of \$28,067.87, is hereby discharged from all further liability to said Western or to Lack on account of the earthquake damage herein and under its policies Nos. 514753 and 515739.

5. That the sum of \$28,067.87 originally deposited into court by Pearl Assurance Company, Ltd., the sum of \$19,250.00, less Clerk's fees of 1%, amounting to \$192.50, or \$19,057.50, is hereby awarded to Western Loan and Building Company, and the sum of \$8817.87, less Clerk's fees of 1%, amounting to \$88.17, or \$8728.56, is hereby awarded to F. S. Lack in accordance with the said mandate of the Circuit Court of Appeals in these two consolidated cases hereinbefore referred to; and the said sum of \$19,250.00 less Clerk's fees of 1% amounting to \$192.50, or \$19,057.50, having been hereto paid to Western by the Clerk of the District Court on November 4, 1941 by his check for the sum of \$27,789.17, and Western, pursuant to said



mandate of the [5] Circuit Court of Appeals having on or about August 13, 1943, paid to F. S. Lack the sum of \$8729.70 by its check dated August 6, 1943, but not having paid any interest thereon, that F. S. Lack is entitled to recover from Western Loan and Building Company the sum of \$1279.83 with interest thereon to June 25, 1945 at 7% per annum.

6. That said Lack have and recover from said Western the sum of \$1279.83, together with interest at 7% per annum to June 25, 1945 together with costs as taxed by the Court in the sum of \$. . . . . and that said F. S. Lack have execution therefor.

7. That said F. S. Lack be and he hereby is granted judgment quieting title in him free and clear of any claim by Western Loan and Building Company, to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes and all personal property in said leased premises on October 30, 1934, together with the additions and replacements to the same and all personal property in said buildings, and Western Loan and Building Company is not entitled to any of said personal property, and is further granted a judgment quieting in him free and clear of any claim by Western Loan and Building Company, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fixtures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows: Lots Fourteen (14),



Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County; together with easements and appurtenances thereunto belonging.

8. That F. S. Lack has been damaged by Western Loan and Building Company on account of the facts set forth in the findings, in the sum of \$27,690.96, with interest thereon at the [6] rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01.

9. That F. S. Lack have and recover from Western Loan and Building Company the sum of \$27,690.96, together with interest at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01, and that said F. S. Lack have execution therefor.

10. That this is a final judgment.

Dated this ..... day of June, 1945.

.....

Judge of United States District Court

Rejected July 1, 1945.

J. F. T. O'CONNOR,

Judge

[Endorsed]: Filed July 3, 1945. [7]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF FINDINGS  
OF FACT AND CONCLUSIONS OF LAW  
AND FINAL JUDGMENT TO JUDGE FOR  
SIGNATURE.

To M. Perelli-Minetti and H. L. Mulliner, 704 South Spring Street, Los Angeles 14, California, attorneys for Western Loan and Building Company, and to Cooley, Crowley and Supple, 206 Sansome Street, San Francisco, California, attorneys for Pearl Assurance Company, Ltd.:

Please Take Notice that the within are copies of Findings of Fact, Conclusions of Law, and of a final judgment which will be presented to the Honorable J. F. T. O'Connor, Judge of the [8] above entitled Court on Monday, July 2, 1945, at ten o'clock a. m. for signature.

HENRY S. DOTTENHEIM

Attorney for F. S. Lack

Dated: June 20, 1945. [9]

Received copy of the within Final Decree and Notice this 20th day of June, 1945.

H. L. MULLINER AND M.  
PERELLI-MINETTI

By M. PERELLI

Attorney for Western Loan  
& Bldg. Co.

[Endorsed]: Filed July 3, 1945. [10]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF FINAL  
JUDGMENT TO JUDGE FOR SIGNA-  
TURE

To John L. Schaefer and Henry S. Dottenheim,  
attorneys for F. S. Lack and to Cooley, Crowley  
and Supple, attorneys for Pearl Assurance Com-  
pany, Ltd.:

Please Take Notice that the within is a copy of  
a Final Judgment which will be presented to the  
Honorable J. F. T. O'Connor, Judge of the above  
entitled Court, on Monday, June 11, 1945, at [11]  
10:00 o'clock A. M., for signature.

Dated: May 22, 1945.

H. L. MULLINER AND M.  
PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Western Loan  
and Building Company

AFFIDAVIT OF SERVICE BY MAIL—1013a,  
C. C. P.

State of California,

County of Los Angeles—ss.

Jean Perelli-Minetti, being first duly sworn, says:  
That affiant is a citizen of the United States and  
a resident of the County of Los Angeles; that  
affiant is over the age of eighteen years and is not  
a party to the within and above entitled action;

that affiant's business address is 704 South Spring Street, Los Angeles 14, Calif., that on the 21st day of May, 1945, affiant served the within Notice of Presentation of Final Judgment to Judge for Signature and Final Judgment on the plaintiff & defendant, F. S. Lack & defendant, Pearl Assurance Company in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiff and defendants. at the office address of said attorneys, as follows: Henry S. Dottenheim, 444 N. Camden Dr., Beverly Hills, Calif. Cooley, Crowley and Supple, 617 S. Olive St., Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

JEAN PERETTI-MINETTI

Subscribed and sworn to before me this 21st day of May, 1945.

[Seal]

LOUISE KOEHLER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 23, 1945. [13]

In the United States District Court, Southern District of California, Central Division.

In Equity

No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY, LTD., a Corporation,

Defendants,

In Equity

No. 84 S. D. Civil O'C

F. S. LACK,

Plaintiff,

vs.

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Defendant.

### FINAL JUDGMENT

The above entitled cases were joined for trial and tried together in the above entitled court and judgment entered hereon October 31, 1941. Thereafter appeal therefrom was taken by S. F. Lack, to the United States Circuit Court of Appeals for the Ninth Circuit.



On or about April 9, 1943 the said Ninth Circuit Court filed Its opinion in which the judgment of the above entitled court was in part reversed, and mandate of the Circuit Court was issued May 29, [14] 1943 and filed in this Court, June 3, 1943.

On December 20, 1943, this Court entered a decree termed "Interlocutory Decree Pursuant to Mandate of the Circuit Court of Appeals". Thereafter and after denial by this Court of Lack's motion to "resettle and amend" said decree Lack filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said interlocutory decree.

And on December 30, 1944 the said Circuit Court filed its opinion dismissing said appeal and its Decision and Its Mandate filed in this Court directed the entry of Judgment herein in accordance with the Mandate of the said United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the Mandate dated May 29, 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cases, is as follows:

"United States of America, ss:

The President of the United States of America  
To the Honorable the Judges of the District Court  
of the United States for the Southern District  
of California, Central Division, Greeting

Whereas, lately in the District Court of the

United States for the Southern District of California, Central Division, before you, or some of you, in cause between Western Loan and Building Company, plaintiff, and F. S. Lack and Pearl Assurance Company, defendants, In Equity, No. 1301, and in a cause between F. S. Lack, plaintiff, and Western Loan and Building Company, defendant, Civil Action No. 84, a decree was duly filed and entered in each of above causes on the 31st day of October, 1941, *which said decree* which said decree is of record and fully set out in said causes in the [15] office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by S. F. Lack, as appellant, against Western Loan and Building Company and Pearl Assurance Company, Ltd., a corporation, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears;

And Whereas, on the 1st day of December in the year of our Lord One Thousand Nine Hundred and forty-two the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted;

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause so far

as appealed from be, and hereby is, reversed with costs in favor of the appellant and against the appellee, Western Loan & Building Co., and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment awarding to Western Loan & Building Co. \$19,250 of the \$28,067.87 deposited by Pearl Assurance Co. in the registry of the court, awarding to Lack the balance (\$8,817.87) of said \$28,067.87 and requiring Western Loan & Building Co. to convey to Lack the Hotel Dunlack, building in Brawley, California, the land on which the building stood, and all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building.

It is further ordered, adjudged, and decreed by this Court, that the appellant, recover against the appellee, Western Loan & Building Co., for his costs herein expended, and have execution therefor.

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as according to right and [16] justice and the laws of the United States ought to be had.

Witness, the Honorable Harlan Fiske Stone,  
Chief Justice of the United States, the 29th day of

May in the year of our Lord One Thousand Nine Hundred and forty-three.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of appellant and against appellee, Western Loan and Building Co., as per Annexed Bill of Items, taxed in detail: \$1122.97.

PAUL P. O'BRIEN,

Clerk

That the Interlocutory Decree of this entered December 20, 1943 is hereby vacated.

That judgment be and hereby is entered on, pursuant to, and in accordance with the foregoing Mandate of the Circuit Court, the terms thereof being hereby incorporated herein and made a part hereof.

It is further ordered that the records of this Court show, as recited in the said interlocutory decree, that Western Loan and Building Company following said mandate of May 29, 1943, has and did perform all acts required by said mandate and this decree.

That said Western Loan and Building Company has complied with and satisfied this Judgment.

This is a Final Judgment.

Dated at Los Angeles, California, this 2 day of July, 1945.

J. F. T. O'CONNOR,

Judge of the United States  
District Court

Judgment entered July 2, 1945.

Docketed July 2, 1945.

Central Co. Book 33, page 603 ; Southern Co.  
Book 10, page 717.

EDMUND L. SMITH,  
Clerk

By FRANCIS E. CROOR,  
Deputy

[Endorsed]: Filed July 2, 1945. [17]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Western Loan and Building Company, a Corporation, and to its attorneys herein and to the above entitled Court:

Notice Is Hereby Given that F. S. Lack, defendant in the first above entitled action and plaintiff in the second above entitled action, which actions have been consolidated in the trial Court, does hereby appeal to the United States Circuit Court of [18] Appeals, for the Ninth Circuit, from the "Final Judgment" heretofore made and entered herein on



the 2nd day of July, 1945, and hereby appeals from the order and orders of the District Court, to wit: the trial Court herein, denying to the defendant F. S. Lack, his motions and applications for amendments to the "Interlocutory" Decree herein and from the refusal of the trial Court to hear or consider or make findings on the application of F. S. Lack and the refusal of the trial Court to make or enter a judgment herein with respect to the issue of damages claimed by the defendant F. S. Lack herein as against Western Loan and Building Company.

That said appeal will be taken both as to law and fact and from the whole of the judgment and in particular for the failure and refusal of the Court to find and determine on the question of damages sustained by F. S. Lack as against the Western Loan and Building Company.

Dated this 28th day of September, 1945.

HARRY W. HORTON

Attorney for Appellant, F. S.  
Lack. [19]

### AFFIDAVIT OF SERVICE BY MAIL

1013a, C. C. P.

State of California,  
County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over

the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 218 Rehkopf Building, El Centro, California; that on the 28th day of September, 1945, affiant served the within notice of appeal on the attorneys for Western Loan and Building Company, in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Western Loan and Building Company, at the office/residence address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. BOYER.

Subscribed and sworn to before me this 28th day of September, 1945.

[Seal]                      GEORGE R. KIRK

Notary Public in and for the County of Imperial,  
State of California.

[Endorsed]: Filed Oct. 1, 1945. [20]

[Title of District Court and Cause.]

STATEMENT OF F. S. LACK OF POINTS  
UPON WHICH SAID APPELLANT IN-  
TENDS TO RELY WITH RESPECT TO  
HIS APPEAL

F. S. Lack having taken and filed an appeal herein from the "Final Judgment" and from the orders and refusals of the trial Court to amend the Interlocutory Decree and to make and [21] file written findings of fact and conclusions of law and in particular the refusal of the trial Court to include a determination of the damages claimed by F. S. Lack as against Western Loan and Building Company and said F. S. Lack having designated the record upon appeal herein, hereby designates the points upon which the said F. S. Lack intends to rely upon his appeal and designates the same as follows:

1. That the United States District Court erred in making and entering the Interlocutory Decree herein and in particular in failing to include in said decree or its judgment and decree in these consolidated cases a finding and determination of the issue of damages claimed by F. S. Lack as against Western Loan and Building Company.

2. The refusal of the trial Court upon the application of F. S. Lack to amend the Interlocutory Decree or to permit there being submitted on behalf of F. S. Lack the issue of damages claimed by Lack as against Western Loan and Building Company.

3. The refusal of the trial Court to make or sign findings of fact and conclusions of law and in particular the rejection by the trial Court of the findings of fact and conclusions of law, or any part thereof, submitted and proposed by F. S. Lack.

4. The error of the trial Court in signing and filing herein a purported "Final Judgment" without findings of fact and conclusions of law being made, and the refusal of the trial Court to include in any final determination or judgment herein a determination of the issue of damages claimed by F. S. Lack as against Western Loan and Building Company.

Dated this 3rd day of October, 1945.

HARRY W. HORTON,

Attorney for Appellant, F S.  
Lack. [22]

## AFFIDAVIT OF SERVICE BY MAIL

1013a, C.C.P.

State of California,  
County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 218 Rehkopf Building, El Centro, California; that on the 3rd day of October, 1945, affiant served the within Statement of Points of appellant upon appeal on the Western



Loan and Building Company, a corp., in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said company, at the office/residence address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) "M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

**L. BOYER**

Subscribed and sworn to before me this 3rd day of October, 1945.

[Seal]                      **GEORGE R. KIRK**

Notary Public in and for the County of Imperial,  
State of California.

[Endorsed]: Filed Oct. 4, 1945. [23]

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[Title of District Court and Causes.]

**DESIGNATION OF CONTENTS OF RECORD  
UPON APPEAL**

In the above entitled actions consolidated in the trial Court, F. S. Lack, as defendant in the first



above entitled cause, and as plaintiff in the second above entitled cause, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the "Final Judgment" made and entered on or [24] about the 2nd day of July, 1945, and having appealed to said Court from the rulings of the trial Court denying F. S. Lack his motions and applications for amendments to the "Interlocutory Decree" and from the refusal of the trial Court to hear or consider or make findings or render a judgment upon the application of F. S. Lack upon the issues of damages claimed by the said F. S. Lack as against Western Loan and Building Company, as said appellant, does hereby designate the portions of the record and proceedings to be contained in the record upon appeal and hereby requests the Clerk of this Court under his hand and the seal of this Court to prepare and transmit to said Appellate Court a true copy of the records hereinafter designated.

That this appeal is taken upon the records and proceedings had in the above consolidated cases, inclusive of the judgment roll, in the proceedings had in the trial Court subsequent to the entry of the original judgment against the said F. S. Lack, which judgment was appealed from and set aside. That the proceedings subsequent to said original judgment include the Interlocutory Decree, the application of F. S. Lack to amend the Interlocutory Decree, and the order of Court refusing the application and striking, on the motion of Western Loan and Building Company, the portions of the

application so ordered stricken, the proposed findings of fact and conclusions of law and final judgment offered by F. S. Lack and refused by the trial Court and the purported "Final Judgment" entered on or about July 2, 1945.

That inasmuch as there is now on file in the United States Circuit Court of Appeals for the Ninth Circuit the record upon appeal from the original judgment against F. S. Lack and there is also on file in said court of appeals the record of the proceedings as to the "Interlocutory Decree", there is hereby designated as a part of the record upon this appeal said record [25] in each of said appeals and in addition thereto the following:

1. The Interlocutory Decree.
2. The motion on behalf of F. S. Lack to amend the Interlocutory Decree and for the inclusion in the judgment or decree of the trial Court after decision on the first appeal herein of the issues relative to damages sustained by F. S. Lack as against the Western Loan and Building Company.
3. The motion of Western Loan and Building Company to strike portions of the motion of F. S. Lack to amend the Interlocutory Decree and include a determination of the damages claimed by F. S. Lack.
4. The order of the trial Court granting the motion of Western Loan and Building Company to strike and denying the application of F. S. Lack

to amend the Interlocutory Decree and include a determination of the damages claimed by F. S. Lack.

5. The proposed findings of fact and conclusions of law and judgment proposed by and on behalf of F. S. Lack and rejected by the trial Court.

6. The "Final Judgment" entered and ordered July 2, 1945.

7. The minutes of the Court and the Reporter's transcript of the proceedings before the trial Court on behalf of F. S. Lack in connection with the foregoing motions and orders.

Dated this 3rd day of October, 1945.

HARRY W. HORTON

Attorney for Appellant, F. S.  
Lack. [26]

AFFIDAVIT OF SERVICE BY MAIL—1013a  
C. C. P.

State of California,

County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is 218 Rehkopf Building, El Centro, California; that on the 3rd day of

October, 1945, affiant served the within Designation of contents of record upon appeal on the Western Loan and Building Company, a corp. in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said company, at the office/residence address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. BOYER

Subscribed and sworn to before me this 3rd day of October, 1945.

[Seal]

GEORGE R. KIRK

Notary Public in and for the County of Imperial,  
State of California.

[Endorsed]: Filed Oct. 4, 1945. [27]



[Title of District Court and Causes.]

STIPULATION AS TO RECORD UPON  
APPEAL

This stipulation made and entered into by and between F. S. Lack in the above consolidated cases, and Western Loan and Building Company in the above entitled consolidated cases, is hereby agreed to be as follows: [28]

The above designated parties hereto, for the purpose of minimizing the record to be required to be printed as and for the record upon appeal herein, do hereby stipulate as follows:

It Is Hereby Stipulated that on behalf of Western Loan and Building Company the following reservation is hereby made, to wit: that this stipulation is made without admitting that any of the records hereinafter referred to have any materiality or relevancy upon this attempted appeal and without admitting the right of the appellant herein to take the appeal to which this stipulation relates, and without admitting that this attempted appeal is within time and without waiving any rights of Western Loan and Building Company to file objections to said appeal or a motion to dismiss the same, said appellee stipulates with appellant as follows:

It Is Hereby Stipulated that in the above entitled consolidated cases an appeal was heretofore taken from the original judgment in said consolidated cases and that the record upon appeal in said case was printed and is the printed record as contained



in case No. 10158 of the United States Circuit Court of Appeal for the Ninth Circuit.

That thereafter a record was prepared upon an appeal attempted to be taken from an Interlocutory Decree and from the failure and refusal of the trial Court to amend or modify said Interlocutory Decree pursuant to an application of F. S. Lack upon which attempted appeal the same was dismissed in the United States Circuit Court of Appeal for the Ninth Circuit upon the motion and application of Western Loan and Building Company. That in said attempted appeal the record upon appeal was printed and is on file in the United States Circuit Court of Appeals for the Ninth Circuit.

That the record in each and both of said appeals, [29] to wit: said appeal in said cause No. 10158 of the United States Circuit Court of Appeals for the Ninth Circuit, and said attempted appeal from said Interlocutory Decree, as the same are on file in said Circuit Court of Appeals for the Ninth Circuit, may be considered as a part of the record upon appeal herein without said record or transcripts being printed or re-printed and reference thereto may be had as a part of the record on appeal herein purely by reference.

That in addition thereto there shall be printed as the remaining portion of the record upon appeal herein the following documents, to wit:

1. The notice of presentation of Findings of Fact and Conclusions of Law and Final Judg-

ment, dated June 20, 1945, with proposed Findings of Fact, Conclusions of Law and Final Judgment attached thereto, presented on July 2, 1945, on behalf of appellant, F. S. Lack.

2. The notice of presentation of Final Judgment presented by Western Loan and Building Company with proposed Final Judgment attached, which was presented July 2, 1945, and adopted and signed by Judge O'Connor of United States District Court.

3. Notice of Appeal filed by and on behalf of F. S. Lack October 1, 1945.

4. Designation of the record and documents to be included in the transcript upon appeal herein.

5. A Statement of Points to be urged on behalf of appellant, F. S. Lack upon the appeal herein.

6. A copy of this Stipulation as to record upon appeal herein.

Dated this 23rd day of October, 1945.

HAROLD W. HORTON

Attorney for Appellant, F. S.  
Lack.

M. PERELLI-MINETTI

Attorney for Appellee,  
Western Loan and Building  
Company.

[Endorsed]: Filed Nov. 1, 1945. [31]

[Title of District Court and Causes.]

ORDER EXTENDING TIME FOR DOCKET-  
ING OF RECORD ON APPEAL.

Sufficient cause appearing therefor, it is hereby ordered that the time for the preparation and docketing of the record upon appeal in the above entitled consolidated matters is hereby extended for a period of twenty (20) days from November 10, 1945.

Dated November 7, 1945.

J. F. T. O'CONNOR  
Judge.

[Endorsed]: Filed Nov. 7, 1945. [32]

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[Title of District Court and Causes.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32 inclusive contain full, true and correct copies of Proposed Form of Final Decree; Notice of Presentation of Findings of Fact and Conclusions of Law and Final Judgment to Judge for Signature; Notice of Presentation of Final Judgment to Judge for Signature; Final Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Stipulation as to Record on Appeal and

Order Extending Time for Docketing Record on Appeal which, together with records on appeals from original judgment and interlocutory Decree, pursuant to stipulation of counsel, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$10.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8th day of November, 1945.

[Seal]                      EDMUND L. SMITH,  
Clerk

By THEODORE HOCKE  
Chief Deputy Clerk.

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[Endorsed]: No. 11179. United States Circuit Court of Appeals for the Ninth Circuit. F. S. Lack, Appellant, vs. Western Loan and Building Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 13, 1945.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals for  
the Ninth Circuit

WESTERN LOAN AND BUILDING COM-  
PANY, a Corporation,

Plaintiff and Appellee,

vs.

F. S. LACK,

Defendant and Appellant,

F. S. LACK,

Plaintiff and Appellant,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a Corporation,

Defendant and Appellee,

#### DESIGNATION OF RECORD ON APPEAL

In the above entitled actions consolidated in the trial Court, F. S. Lack, as defendant in the first above entitled action and as plaintiff in the second above entitled action, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, does hereby in the above entitled Court designate the record upon appeal herein to be as follows, being the same record as designated in the trial Court:

Designation of Record on Appeal

Final Judgment



Final Decree (Proposed Form, Lack's)

Names and Addresses of Attorneys

Notice of Appeal

Notice of Presentation of Final Judgment to  
Judge for Signature, Western's

Notice of Presentation of Findings of Fact and  
Conclusions of Law and Final Judgment to Judge  
for Signature, Lack's

Statement of Points on Appeal

Stipulation as to Record on Appeal

Designation of Record in the United States Cir-  
cuit Court of Appeals for the Ninth Circuit

Statement of Points upon which Appellant will  
rely.

Dated November 14, 1945.

HARRY W. HORTON

Attorney for F. S. Lack, Ap-  
pellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 16, 1945. Paul P.  
O'Brien, Clerk.



No. 11179

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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F. S. LACK,

Appellant,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a corporation,

Appellee.

---

SUPPLEMENTAL  
Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

FEB 14 1946

PAUL P. O'BRIEN,  
CLERK



No. 11179

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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F. S. LACK,

Appellant,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a corporation,

Appellee.

---

SUPPLEMENTAL  
Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division





## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States  
For the Southern District of California  
Central Division

In Equity No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COM-  
PANY, a Corporation,  
Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY,  
LTD., a Corporation,  
Defendants.

In Equity No. 84 S.D. Civil O'C

F. S. LACK,  
Plaintiff,

vs.

WESTERN LOAN AND BUILDING COM-  
PANY, a Corporation,  
Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above entitled cause, No. 130 O'C Civil, Cen-  
tral Division, having been filed in this court, and  
the above entitled cause, No. 84 O'C Civil, Southern  
Division, having been commenced in the Superior  
Court of the State of California in and for the

County of Imperial, No. 19637, and thereafter removed to this court, and the said two causes having been consolidated and tried together before the Hon. J. F. T. O'Connor, Judge; and a Final Decree thereupon having been filed and entered on October 31st, 1941, in Civil Order Book for the Central Division, No. 7 at page 235 et seq., and in Civil Order Book for the Southern Division, No. 1 at page 482 et seq.; and, pursuant to said Decree, inter alia, the court having ordered that the \$28,067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, in [1] case No. 1301 O'C. Civil, Central Division, on January 29th, 1941, be paid to the Western Loan and Building Company, a corporation, of which said sum of \$28,067.87, less clerk's fees of one per cent amounting to \$280.68, or \$27,787.19, was paid by the clerk of the District Court to the Western Loan and Building Company, a corporation, on November 4th, 1941; and

The said F. S. Lack, the defendant in said cause No. 1301 O'C. Civil, Central Division, and plaintiff in said cause No. 84 O'C. Civil, Southern Division, having appealed from a part of said Decree, and from the order denying his Motion for a new trial, dated and filed March 13th, 1942, to the Circuit Court of Appeals for the Ninth Circuit, to the extent and as more fully set forth in the said Notice of Appeal, dated and filed May 1st, 1942; and the said United States Circuit Court of Appeals having rendered its Opinion, filed April 9th, 1943, in the said court, and reported in 134 Fed. Supp. 1017,



and having made its Decree reversing that part of the said judgment appealed from, and directing the entry of judgment in this court; and the said Mandate of said United States Circuit Court of Appeals for the Ninth Circuit in these two causes bearing date May 29th, 1943, having been duly transmitted to this court, and having been filed and spread on the minutes of this court on the 3rd day of June, 1943, decreeing that that part of the judgment of the said District Court in these two causes, so far as appealed from, be reversed with costs in favor of the appellant, F. S. Lack, and against the appellee, Western Loan and Building Company, a corporation, with directions to the District Court to enter judgment awarding to Western Loan and Building Company, a corporation, the sum of \$19,250.00 of the \$28,067.87 deposited into court by the Pearl Assurance Company, Ltd.; a corporation, and awarding to F. S. Lack the sum of \$8,817.87 of the said \$28,067.87, and requiring the Western Loan and Building Company, a corporation, to convey to F. S. Lack the [2] Hotel Dunlack Building in Brawley, California, the land on which the building stood, and affirming that part of the District Court's decree requiring the Western Loan and Building Company, a corporation, to convey and transfer to F. S. Lack all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building, and that the appellant, F. S. Lack, recover against the appellee, Western Loan and Building Company, a corporation, for his costs expended on appeal and

taxed by the Circuit Court of Appeals, the sum of \$1122.97; and

This Court having made its interlocutory decree dated December 20, 1943, entered and docketed December 20, 1943, in Book CO 22 at page 451, and having by orders denied all motions by F. S. Lack to amend or re-settle said decree and for other relief;

And said F. S. Lack having appealed from said interlocutory judgment and said orders in the manner and to the extent set forth in the notice of appeal dated and filed March 19, 1944, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said United States Circuit Court having rendered its opinion filed December 30, 1944, in said Court, and having made its decree dismissing said appeal and the mandate of said United States Circuit Court in said causes bearing date of December 30, 1944, having been transmitted to this Court by the United States Circuit Court and said mandate having been duly spread on the minutes of this Court on the 25th day of June, 1945,

And the Court having heard and considered the arguments of counsel and being fully advised in the premises,

Now Upon Motion of Henry S. Dottenheim, attorney for F. S. Lack, Henry S. Dottenheim appearing of counsel for said F. S. Lack, and M. Perelli-Minetti appearing of counsel for Western Loan and Building Company, and no one else appearing, [3] the Court does in both of said consolidated cases

hereby make the following Findings of Fact and Conclusions of Law in place and in stead of the Findings of Fact and Conclusions of Law heretofore made and filed October 31, 1941, which are hereby vacated:

### FINDINGS OF FACT

1. That hereinafter for convenience in these Findings F. S. Lack will be called "Lack," Western Loan and Building Company will be called "Western," and Pearl Assurance Company, Ltd., will be called "Pearl."

That by a certain lease and option, Lack's Exhibit A, made and entered into as of November 10, 1934, by and between Western as Lessor and Lack as Lessee, Lack leased from Western the Hotel Dunlack at Brawley, California, including land, building, furniture, furnishings, fixtures, and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

for six years commencing on the first of January, 1935, and ending on the 31st day of December, 1940,

unless said term be sooner terminated as therein provided.

2. The rent for the premises as provided in said lease was as follows: The Lessee agrees to pay and the Lessor agrees to accept the following sums: Five Hundred Twenty-five and no/100 Dollars (\$525.00) on January 1, 1935; Five Hundred Twenty-five and no/100 Dollars (\$525.00) on April 1, 1935; Five Hundred [4] Twenty-five and no/100 Dollars (\$525.00) on July 1, 1935; Five Hundred Twenty-five and no/100 Dollars (\$525.00) on October 1, 1935; Fourteen Hundred and no/100 Dollars (\$1400.00) on January 1, 1936, and quarterly thereafter the sum of Eight Hundred Seventy-Five and no/100 Dollars (\$875.00) plus interest at the rate of six per cent (6%) per annum on the balance remaining under this lease; said rents falling due on the first day of January, April, July and October of each year until the expiration of this lease.

3. The said lease and option agreement, Exhibit A, granted to Lack an option to purchase the property heretofore described for \$35,000.00, upon the terms more fully and completely set forth in Exhibit A, but which were substantially as follows:

“At any time during the term hereof, provided that the Lessee shall not be in default in the performance of any promise, covenant or condition herein contained provided to be performed by the Lessee, Lessee is hereby granted the option to purchase said demised premises and properties from the Lessor for a purchase price of Thirty-five Thou-



sand and no/100 Dollars (\$35,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of January, 1936, to the date upon which the Lessee agrees to purchase said property in accordance with the terms of the said option. Said option shall be exercised by the delivery of written notice of the exercise thereof to the Lessor at the place where the rent hereunder shall be payable. \* \* \*

“The purchase price shall be payable as follows: Seventeen Thousand Five Hundred and no/100 Dollars (\$17,500.00) of said purchase price and a sum equal to interest upon said purchase price at the aforesaid rate from January 1, 1936, until the date of the exercise of said option shall be paid by the lessee to the Lessor upon the [5] date the Lessee exercises his option to purchase said property. There shall be credited upon said payment and upon said purchase price all payments theretofore received by the Lessor from the Lessee as rental pursuant to the terms hereof. The balance of the said purchase price, together with interest thereon at the rate of six percent (6%) per annum from the date upon which the Lessee exercises the said option until the entire purchase price is fully paid, shall be payable in quarterly installments of Eight Hundred Seventy-five and no/100 Dollars (\$875.00) plus interest on balance due as above set forth, said payment being due and payable on the first day of January, April, July and October of each year until the whole purchase price has been paid. \* \* \*



“The Lessor may deliver a good and sufficient deed to the Lessee conveying title to said property \* \* \* Contemporaneously with the delivery of said deed, the Lessee, shall either pay the unpaid balance of the purchase price or execute and deliver to the Lessor his several promissory notes, payable to Western \* \* \* in a sum equal to the unpaid balance of the purchase price with interest \* \* \*.”

4. Lack took possession of the property under the said lease on January 1, 1935, and continuously thereafter retained and now retains possession thereof.

5. Between January 1, 1935, and May 18, 1940, Lack made improvements on the building, expending more than \$18,000.00 therefor, and made each and every of the quarterly payments required of him during that period, to wit, the sum of \$15,750.00, which were applied by Western to the principal account and \$7,205.70 applied by Western to interest account up to July 1, [6] 1940, in all the sum of \$22,955.00, which from January 1, 1935, when the lease commenced, to May 18, 1940, when the earthquake occurred, was an average of \$358.68 per month during said period.

6. That Lack wrote a letter to Western on December 1, 1934, reading as follows:

“Upon request of Mr. Berdel, your San Diego agent, am submitting to you my understanding of the purchase by me of the Hotel Dunlack property, situate in Brawley, California. The executive board of Western accepted my written proposition for

the purchase of the property, and you were authorized by Salt Lake office to notify me to that effect and further told me I could go ahead and make purchase of new lobby furniture and rehabilitate the hotel, which I proceeded to do. I also signed the contract prepared by you for the purchase and executed and delivered a bill of sale to Western for the entire furnishings of the hotel, thereby complying with my part of the contract to the letter. \* \* \* The question of taxes came up at the meeting of the executive board and you told them all taxes had been paid. However, that does not enter into it, for I purchased the property for a fixed amount. \* \* \*

7. Lack by said letter and by said policies described in Finding 12 hereof delivered to Western and accepted by them, gave written notice to Western of the exercise of the option contained in said lease to purchase said property, at least prior to the date of the earthquake, when the lease was concededly in good standing, and Lack exercised the option to purchase said property by the delivery of written notice to Western as aforesaid on or before April 26, 1939.

8. That on October 30, 1934, Lack issued and delivered to Western a bill of sale covering and describing the furniture, [7] furnishings and fixtures then in said hotel building.

9. That said bill of sale was not intended to convey title to said Western absolutely but only as security for the performance of the lease as to

the payments of the amounts therein defined as rentals, and all rentals required to be paid under said lease were paid by Lack and the personal property covered by said bill of sale belongs to Lack and is unencumbered by any claim of Western as security or otherwise.

10. That the said lease and option contained the following provisions:

“If the demised premises be damaged by fire or other casualty so that they cannot be repaired or restored within twenty (20) working days after possession is given to the Lessor for that purpose, then and in that event this lease shall terminate and the parties hereto shall be released from all obligations hereunder thereafter accruing, but if such damage can be repaired within said period of twenty (20) days then and in that event the Lessor shall repair said demised premises at its own cost and expense, provided that labor and materials can be obtained at the then prevailing rates, reasonable allowance being made for any delay from strikes or other causes beyond the control of the Lessor. No deduction or rebate in rent shall be allowed by reason of any such damage or destruction.”

11. That Western Loan and Building Company is a building and loan corporation duly organized under and by virtue of the laws of the State of Utah; that F. S. Lack is a resident of the State of California, and that defendant, Pearl Assurance Company, Ltd., is a corporation organized and existing under the laws of England; and that the

jurisdiction of the above entitled court is [8] conferred in both cases by virtue of the diversity of the citizenship of the parties and by virtue of the fact that the amount involved in the claims of the parties is more than Three Thousand Dollars (\$3,000.00) exclusive of interests and costs.

12. That Pearl on or about March 15, 1939, for a valuable consideration, duly issued and mailed to Western and delivered its insurance policy No. 514753, dated May 6, 1939, in the principal sum of \$15,000.00; and that on or about November 10, 1939, for a valuable consideration, duly issued and mailed to Western and delivered its insurance policy No. 515739, dated August 30, 1939, in the principal sum of \$12,000.00. Receipt of Policy No. 514753 was acknowledged by Western on April 26, 1939, and of policy No. 515739, on September 20, 1939, both in writing and by mail. That said policies covered and insured the hotel buildings owned by Lack, and situated on Lots 14, 15, and 16, in Block 79, Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, in the said respective amounts against loss by fire and earthquake casualty. That Western Loan and Building Company was the assured named in said policies. Each policy provided:

“It is understood that F. S. Lack, hereinafter termed ‘vendee’, has an interest in the within described property by virtue of a contract of sale from Western Loan and Building Company of Salt Lake City, Utah, hereinafter termed ‘vendor’, \* \* \* if



this policy be not payable to a mortgagee, trustee or beneficiary under a deed of trust, the proceeds of this policy subject to all its terms and conditions shall be payable to said vendor and/or said vendee as follows: (1) to said vendor to an amount not exceeding the balance unpaid at the time of loss upon the contract of sale above referred to, and (2) the balance, if any, to said vendee." [9]

13. That the damage to said hotel by reason of said earthquake is the sum of \$52,049.00 and that said damage could not be repaired within twenty days as contemplated by the said provision of said contract. That said property was so damaged and so far destroyed as to require much longer than twenty days to repair or restore the same. That such repair or restoration would and will require approximately three to five months. Except for this quoted provision all repairs to said leased property were required by the lease to be made by the lessee.

14. Said policies of insurance were furnished by Lack, who paid the premiums thereon, and who was entitled to the return premium after cancellation, and they were furnished to the Western Loan and Building Company pursuant to the Lease and Option agreement hereinafter referred to and by agreement and understanding between Lack and Western and were accepted by Western and held and relied on by it at the time of the earthquake herein referred to and at the time of the trial. That the said policies of insurance insured Western



against both fire and earthquake casualty. The Lease and Option Agreement hereinafter referred to recited with relation to said insurance as follows:

“All of said policies of insurance shall provide that loss thereunder shall be payable to the Lessor and shall be delivered to and held by the Lessor. The Lessor shall have full power to adjust, collect, receipt for and compromise any claims under any of said policies of insurance. Upon the failure of the Lessee to secure said insurance the Lessor is hereby expressly authorized to procure the same. The Lessee agrees to immediately remit to the Lessor the amount expended therefor.”

15. That on May 18, 1940, an earthquake occurred at Brawley causing the said hotel building to be seriously damaged as and in the manner insured against by the defendant, assurance [10] company, in the said policies; at said time and at all the times herein mentioned plaintiff was the owner of said damaged property and the holder of said insurance policies, and same had been continued and at said time were in full force and effect and were hereafter by the insurer cancelled.

16. After the earthquake the damages so caused to the hotel building covered by said policies were determined and mutually agreed to by all the parties, plaintiff and defendant herein, as being the amount of \$52,049.00, and after deducting the amounts allowed by the policy agreements to be deducted from the face amounts of the policies by the defendant, assurance company, there became

and was due from said defendants, assurance company, under said policies, the sum of \$28,067.87. That the defendant, assurance company, deposited the said sum in the above entitled court and with the Clerk of said court in case No. 1301 disclaiming any interest therein and asking that the rights of Western and Lack as to said funds, be determined and that said amount be paid to the party entitled thereto, and that the said assurance company be discharged from further liability.

That F. S. Lack in case No. 1301 made claim to said insurance fund by reason of the alleged breach by Western of a provision of the Lease and Option agreement entered into by said Lack, as lessee, and Western, as lessor, November 10, 1934, covering and describing the hotel building and properties hereinabove described; and in case No. 84 the said F. S. Lack again alleged the breach of the same provision of said contract and prayed for a decree of specific performance requiring Western to repair the said premises, and to use the said insurance fund for said purposes, or for damages for the alleged breach of said provision by the said Western. That the said provision of said Lease and Option so alleged by Lack to have been breached, reads as follows:

“If the demised premises be damaged by fire or other casualty so that they cannot be repaired or [11] restored within twenty working days after possession is given to the Lessor for that purpose, then and in that event this lease shall terminate

and the parties hereto shall be released from all obligations hereunder thereafter accruing, but if such damage can be repaired within said period of twenty days then and in that event the Lessor shall repair said demised premises at its own cost and expense, provided that labor and materials can be obtained at the then prevailing rates, reasonable allowance being made for any delay from strikes or other causes beyond the control of the Lessor. No deduction or rebate in rent shall be allowed by reason of any such damage or destruction."

17. On May 18, 1940, the building was seriously damaged by an earthquake.

18. Between May 18, 1940, and July 1, 1940, Western and Lack submitted to Pearl a joint proof of loss and Western's agent told Lack that he need not make any payments falling due under the contract after May 18, 1940; that Western and Lack "could settle that up" after they received the proceeds of the insurance policy.

19. That Lack made no further payments except as hereinafter set forth after the earthquake.

20. On September 11, 1940, Western, Lack, and Pearl executed an agreement determining the extent of the damage to the building. In that agreement Western and Lack described themselves as vendor and vendee and in that agreement Lack, Pearl and Western mutually agreed that the damages so caused by the earthquake were in the amount of \$52,049.00, and after deducting the amounts allowed by the policy agreements to be de-

ducted from the face amounts of the policies by the defendant, assurance [12] company, there became and was due from said defendant, assurance company, under said policies, the sum of \$28,067.87. That the defendant, assurance company, deposited the said sum in the above entitled court and with the Clerk of said court in case No. 1301 disclaiming any interest therein and asking that the rights of Western and Lack as to said funds, be determined and that said amount be paid to the party entitled thereto, and that the said assurance company be discharged from further liability.

21. That Western at all times since the earthquake repudiated said option agreement and refused to be bound by the terms thereof upon the ground that the same had never been exercised by Lack up to the time of the earthquake and that at the time of the earthquake the lease and option had terminated and therefore Lack never became entitled to exercise the option and Western claimed throughout the trial that the option was at an end and that Lack had no rights in the real estate, the subject matter of the lease.

22. At the close of the trial, after this Court had ruled that Western was under no duty to repair the hotel and that it was not incumbent upon it to contribute any money towards its repair, Lack acquiesced in the ruling of the Court and by his counsel demanded that the hotel be conveyed by Western to him in its unrepaired condition and that the Court might take the unpaid balance of the



purchase price, namely, \$19,250.00 out of the said insurance fund then deposited in the Court amounting to \$28,067.87.

23. Western then and there reiterated its refusal to make such a conveyance, claiming the property, the insurance fund, and all improvements as its property and again repudiating the option agreement.

24. From January 1, 1935, to May 18, 1940, the date of the earthquake, the operations of the hotel produced a net profit of \$900.00 per month, after deducting all principal [13] payments, taxes, insurance, and operating costs as shown by Lack's original ledger and journal, received in evidence in his behalf for this purpose, being Lack's Exhibits L and M.

25. These net profits were admitted by Western.

26. The payments of principal were capital expenditures by Lack and are to be regarded as additional net profits earned by Lack in the operation of the hotel, so that the average net profits earned by Lack in the hotel from its operation from January 1, 1935, to May 18, 1940, was the sum of \$1258.68 per month, or a total for said period of \$81,039.52.

27. That on or about August 3, 1943, pursuant to the order of this Court, Western delivered its grant deed in the usual form conveying to Lack the real property described herein and has since delivered to Lack the title insurance policy required



by the terms of the contract of option, and has delivered to Lack a bill of sale to the furniture and furnishings contained in said hotel.

28. That had Western delivered a deed to the hotel when it was demanded at the end of the trial on October 3, 1941, Lack could have had the property repaired within from three to five months as heretofore found and assuming that it would have taken the maximum of five months, could have had the property repaired and in condition to operate as a hotel on or before March 3, 1942.

29. Not having received the deed until August 3, 1943, he could not have had the property repaired, giving Western the maximum credit again, until January 3, 1944.

30. That Lack has been damaged by the withholding of said deed and the acts of Western as aforesaid by losing his profit in the operation of said hotel for the period of March 3, 1942, to January 3, 1944, at the rate of \$1258.68 per month, or a total sum of \$27,690.96, with interest thereon from the average date between March 3, 1942, and January 3, 1944, to wit: February [14] 3, 1943, to June 25, 1945, at 7% per annum, to wit, the sum of \$4841.05, in all the sum of \$32,532.01.

31. That the costs required to be paid by the mandate of the United States Circuit Court in the sum of \$1122.97, have been paid by Western.

32. That on November 13, 1941, and pursuant to the original decree herein filed, interest from

October 31, 1941, has been reversed as aforesaid by the Circuit Court of Appeals and Western withdrew from the registry of this Court the sum of \$28,067.67 deposited by Pearl in the registry of this Court, less the Clerk's fee amounting to \$280.67, or in all the sum of \$27,787.20; that by the decree of the Circuit Court Lack is entitled to \$8,817.87 less Clerk's fees amounting to \$88.17, or in all \$8729.70, out of said moneys to withdrawn from the registry of the Court by Western.

33. That Western paid Lack the sum of \$8729.70 on August 13, 1943, by issuing and delivering to Lack its certified check dated August 6, 1943, payable to F. S. Lack, John L. Schaefer and Henry S. Dottenheim, his attorneys, and Lack has since received the proceeds of said check.

34. That interest on said sum of \$8729.70 from November 4, 1941, to August 13, 1943, at the rate of 7% per annum is the sum of \$1134.28; that the interest on \$1134.28 from August 13, 1943, to June 25, 1945, is the sum of \$145.55, or in all the sum of \$1279.83, with interest from June 13, 1945, at 7% per annum.

### CONCLUSIONS OF LAW

1. Pearl is entitled to an order and judgment herein, discharging it from all further liability to Western or Lack under its said insurance policies Nos. 514753 and 515739.

2. That Lack is entitled to judgment quieting title in him free and clear of any claim by Western,

to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes, [15] and all personal property in said leased premises on October 30, 1934, together with the additions and replacements to the same and all personal property in said buildings, and Western is not entitled to any of said personal property and is further entitled to a judgment quieting in him free and clear of any claim by Western, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fixtures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

3. That he is entitled to judgment vacating the Findings of Fact and Conclusions of Law hereinbefore referred to dated October 31, 1941, and filed on the same day, and vacating the decree dated October 31, 1941, and entered October 31, 1941, and docketed on the same day in Book CO 7, page 235, and Book CO 1, page 482.

4. That Lack exercised the option to purchase the Hotel Dunlack as hereinbefore set forth in these Findings, prior to the earthquake in the year 1939,

and at the date of the trial herein, was entitled to the conveyance of said hotel with all its furnishings, furniture and fixtures at the date of the earthquake, May 18, 1940.

5. That on or about October 31, 1941, and upon the trial of this action, Lack was entitled to a conveyance to the hotel property which Western refused to convey and at said time and at all times during said trial Western refused to be bound by said option [16] and repudiated the same.

6. That Lack is entitled to recover as damages the profits which he would have made in the hotel from March 3, 1942 to January 3, 1944 at \$1258.00 per month, or in all the sum of \$27,690.96, and that Lack is entitled to judgment against Western for said sum of \$27,690.96, with interest thereon from February 3, 1943 to June 25, 1945 at 7% per annum, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01.

7. That said F. S. Lack is entitled to judgment quieting title in him free and clear of any claim by Western Loan and Building Company, to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes and all personal property in said buildings, and Western Loan and Building Company is not entitled to any of said personal property, and is further granted a judgment quieting in him free and clear of any claim by Western Loan and Building Company, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fix-



tures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows:

Lots Fourteen (14), Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County.

8. That F. S. Lack has been damaged by Western Loan and Building Company on account of the facts set forth in the findings, in the sum of \$27,690.96, with interest thereon at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01. [17]

9. That F. S. Lack is entitled to judgment against Western Loan and Building Company in the sum of \$27,690.96, together with interest at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01, and that said F. S. Lack have execution therefor.

Dated, this 25 day of June, 1945.

.....

Judge of the United States  
District Court. [18]

[Endorsed]: Filed July 9, 1945.



Received copy of the within Findings of Fact and Conclusions of Law this 20th day of June, 1945.

H. L. MULLINER &  
M. PERELLI-MINETTI

By M. PERELLI-MINETTI  
Attorney for Western Loan & Building Co., Plain-  
tiff and Defendant

[Endorsed]: Filed July 9, 1945.

---

[Title of District Court and Causes.]

SUPPLEMENTAL DESIGNATION OF  
RECORD

To the Clerk of the Above Entitled Court:

In the above actions consolidated in the trial Court, F. S. Lack having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and having heretofore filed in this Court on behalf of said F. S. Lack his "Designation of [20] Contents of Record upon Appeal," dated October 3, 1945, and having also filed in this Court a written stipulation between the parties concerning said record, which stipulation is dated October 23, 1945, now calls to your attention an omission from said record as certified by you to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. Said omission being as follows: There is not contained in said record as certified by you to said Clerk, the proposed Find-

ings of Fact and Conclusions of Law proposed on behalf of Lack and rejected by the Court on July 2, 1945, as specified in Designation No. 5 in Lack's Designation and in Designation No. 2 in said stipulation.

Now Therefore, this supplemental designation to include in said transcript and as a part of said record the proposed Findings of Fact and Conclusions of Law offered on behalf of F. S. Lack and rejected July 2, 1945, is hereby requested of you and you are requested to certify the same as a supplemental transcript to the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2nd day of January, 1946.

HARRY W. HORTON,

Attorney for Appellant, F. S.  
Lack.

(Affidavit of Service by mail attached.) [21]

---

[Title of District Court and Causes.]

CLERK'S CERTIFICATE TO SUPPLEMEN-  
TAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 22, inclusive, contain full, true and correct copies of Proposed Findings

of Fact and Conclusions of Law filed July 2, 1945, and Supplemental Designation of Record which constitute the supplemental transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing supplemental transcript amount to \$5.20 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9th day of January, 1946.

[Seal]                      EDMUND L. SMITH,  
Clerk.

By THEODORE HOCHE,  
Chief Deputy Clerk.

---

[Endorsed]: No. 11179. United States Circuit Court of Appeals for the Ninth Circuit. F. S. Lack, Appellant, vs. Western Loan and Building Company, a corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 10, 1946.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



No. 11179

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

F. S. LACK,

*Appellant,*

*vs.*

WESTERN LOAN AND BUILDING COMPANY, a corporation,

*Appellee.*

---

Upon Appeal from the District Court of the United States  
for the Southern District of California,

Central Division

---

APPELLANT'S OPENING BRIEF.

---

HARRY W. HORTON,

218 Rehkopf Building, El Centro, California,

*Attorney for Appellant, F. S. Lack.*





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No. 11179

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

F. S. LACK,

*Appellant,*

*vs.*

WESTERN LOAN AND BUILDING COMPANY, a corporation,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### Statement Concerning Transcripts and Records of This Appeal.

This appeal necessitates a review of the record and transcripts in cases numbered 10158 and 10730, each, F. S. Lack vs. Western Loan and Building Company, and the transcripts in this cause number 11179. By stipulation and to avoid the reprinting of the transcripts in cases 10158 and 11730, the transcript on this appeal incorporates by reference the transcripts in the two other cases. (See Stipulation, p. 27.) The original transcript herein by error did not contain an essential part of the record and, therefore, a Supplemental Transcript was necessitated. The transcripts involved in this appeal as

the record herein, therefore, consist of the transcript and supplemental transcript in this case number 11179 and the transcript in case number 10158 and the transcript in case number 11730.

### **Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.**

September 6, 1934, Lack offered, in writing, to purchase from Western Loan and Building Company, a Utah corporation [Tr.10158, p. 2] (hereinafter referred to as "Western"), the Dunlack Hotel at Brawley, California, for \$35,000.00. [Tr. 10158, p. 715.] This offer resulted in a written contract between the parties, termed and claimed by Lack to be a contract of sale and by Western a lease [Tr. 10158, p. 34], for the consideration of \$35,000.00. While the contract was in force an earthquake occurred on May 18, 1940. Lack had taken out insurance against earthquake [Tr. 10158, p. 139] with the Pearl Assurance Company, Ltd., a corporation organized under the laws of England. [Tr. 10158, p. 2.] Lack was a resident of California. [Tr. 10158, p. 3.] Western claimed Lack's contract terminated and claimed the insurance. Lack claimed the contract in force and the insurance money. Western filed suit in the District Court (Case No. 1301-B), for the total of the insurance money, making Pearl Assurance Company as a party defendant and to quiet title as against Lack as to the Dunlack Hotel property, jurisdiction being predicated on divergency of citizenship and the controversy exceeding \$3,000.00 [Tr. 10158, p. 2] and Pearl Assurance answered [Tr. 10158, p. 21] and deposited \$28,067.87 insurance money with the District Court. [Tr. 10158, p. 75.]



Lack, in turn, filed suit in the Superior Court in California against Western to establish his right under the contract and for specific performance and for damages [Tr. 10158, p. 27] and the case was removed to the District Court [Tr. 10158, p. 58] as case No. 84 S. D. The cases were consolidated in the District Court and Findings and Judgment entered against Lack and in favor of Western. [Tr. 10158, pp. 76 and 90.]

Jurisdiction of the District Court was established by Section 41 of Title 28 of U. S. Code.

An appeal was taken from the Decree of the consolidated cases, resulting in a reversal as found in case number 10158 of this Court and as reflected in its opinion in *Lack v. Western*, reported in 134 F. (2d) 1017.

Upon the return of the matter to the District Court an Interlocutory Decree was entered. [Tr. 10730, p. 12.] Thereafter on behalf of Lack a motion was made to re-settle and amend the Interlocutory Decree and for other relief [Tr. 10730, p. 19] and Western made a motion to strike portions of Lack's proceedings [Tr. 10730, p. 25] and Western's motion was granted and Lack's motion denied. [Tr. 10730, p. 31.] Lack attempted an appeal from the Interlocutory Decree and from the orders last mentioned [Tr. 10730, p. 32], which appeal was dismissed by this Court on the grounds that the Interlocutory Decree and the Orders appealed from were not final and, therefore, an appeal therefrom would not lie. This Court's decision being set forth in *Lack v. Western*, 146 F. (2d) 852.

Thereupon the following proceedings were had in the District Court: On behalf of Lack, Findings of Fact and Conclusions of Law were served and offered for settlement and signing [Tr. 11179, p. 35 Sup. Tr.] and

noticed for presentation [Tr. 11179, p. 9] and a Final Decree was served and offered for settlement and signing. [Tr. 11179, p. 2.] The District Court rejected all findings, conclusions of law and refused to make any findings or conclusions of law and entered what is termed a "Final Judgment" [Tr. 11179, p. 12] on July 2, 1945. Lack served and filed his notice of appeal from that "Final Judgment" and from the District Court's orders more particularly hereinafter referred to,—doing so on September 28, 1945. [Tr. 11179, p. 17.]

Jurisdiction of this Court on this appeal is claimed under Title 28, Section 225a of U. S. Code.

### Statement of Case and Questions Involved.

The pleadings in the consolidated cases in the District Court included in Lack's complaint against Western [Tr. 10158, p. 27] not only the issue as to the insurance money, but an issue of damages [Tr. 10158, pp. 32 and 33] for Western's repudiation of the contract between the parties. The District Court, in its original decision, found against Lack and held that the contract had been terminated by the earthquake results. This Court reversed that holding and held the contract to be in force and effect.

Upon return of the matter to the District Court an Interlocutory Decree was entered. [Tr. 10730, p. 12.] On behalf of Lack an Interlocutory Decree was presented, which as to the matter of damages would have referred the matter of damages to a Special Master. [Tr. 10730, p. 11, as to notice, and p. 8, as to decree.] The Court, however, chose to enter the decree signed December 20,

1940. [Tr. 10730, pp. 12-19.] In paragraph VIII of that Interlocutory Decree the District Court provided:

“That this Court retains jurisdiction for the determination of the matters herein undisposed of and the said F. S. Lack is hereby granted permission to apply for such other and further relief regarding the matters herein described and for costs of suit incurred in the District Court.” [Tr. 10730, p. 18.]

As the total of the insurance money deposited with the District Court by Pearl Assurance Company had been paid to Western on November 4, 1941 [Tr. 10158, p. 872, and Tr. 10730, p. 16] and the portion thereof awarded to Lack by this Court's decision on appeal in case number 10158 was not paid or returned to Lack until August of 1943 [Tr. 10730, p. 16], and as the matter of damages had not been disposed of, Lack made a motion to resettle and amend the Interlocutory Decree in those respects. [Tr. 10730, p. 19.]

In this motion Lack not only sought interest on his portion of the insurance money during the time Western had had same [Tr. 10730, p. 20], but sought a hearing in the District Court on the issue of damages and a reference therefor on the evidence already in and for leave to file further pleadings on the matter of damages if the District Court determined the pleadings to be insufficient. [Tr. 10730, pp. 20-22.] To this motion Western replied by a motion to strike part of Lack's proceedings [Tr. 10730, p. 25] and Western's motion was granted and Lack's motion denied. [Tr. 10730, p. 31.] As hereinbefore stated, Lack appealed from the Interlocutory Decree and from these orders and the ap-

peal was dismissed in case number 10730 of this Court on the grounds the matters were not final and therefore not appealable. *Lack v. Western*, 146 F. (2d) 852.

Again, in the District Court Lack sought to have findings and conclusions of law made on these issues [Tr. 11179, pp. 35 and 9], and for a final judgment or decree so that the issue of damages could be determined [Tr. 11179, p. 2] and the trial Court refused to make findings or conclusions and signed what is designated as a "Final Judgment", without passing upon Lack's attempts to amend the pleadings or to secure a hearing or to have the trial Court determine the matter of interest or damages. [Tr. 11179, p. 12.]

The appeal herein is from that "Final Judgment" and from the trial Court's rulings in refusing to permit amended pleadings or trial of the issue of damages or interest or any proceedings on those issues and its refusal to make findings of fact or conclusions of law. [Tr. 11179, p. 17.] The points to be urged on appeal filed by Lack correspond to the appeal. [Tr. 11179, p. 20.]

### **Lack Entitled to Findings and Conclusions of Law.**

That Lack was and is entitled to have findings of fact and conclusions of law by the trial Court is established by Rule 52 of rules of practice of Civil Proceedings.

*Edmunds Federal Rules*, Vol. 2, Rule 52.

#### *Findings by the Court:*

"(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions



the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. Requests for findings are not necessary for purposes of review."

### **Lack Entitled to Further Proceedings in Trial Court.**

That Lack was and is entitled to further proceedings in the trial Court after this Court's decision on appeal in case number 10158 is determined by the following cases, among others:

*The Santa Maria*, 23 U. S. 431; 6 L. Ed. 359;

*Hawkins v. Blake*, 108 U. S. 422; 27 L. Ed. 775;

*Sprague v. Ticoni Bank*, 307 U. S. 161, at 166;  
83 L. Ed. 1184, at 1188;

It is, therefore, respectfully submitted that the "Final Judgment" herein should be vacated and the matter returned to the trial Court for the purpose of, 1, allowing such amendment to the pleadings of either Lack or Western as may be necessary and requested to allege the issues and supplemental issues between the parties arising since the original trial as may be needed for a full hearing. On issues other than those settled by this Court's decision in case No. 10158, and; 2, further trial proceedings as may be necessary for the taking of evidence in such issues, including interest or damages; and, 3, that the trial Court be directed to make findings of fact and its conclusions of law before judgment be entered in the matter.

Respectfully submitted,

HARRY W. HORTON,

*Attorney for Appellant, F. S. Lack.*





**In the  
United States Circuit Court of Appeals  
for the Ninth Circuit**

F. S. LACK,

APPELLANT,

VS.

WESTERN LOAN AND BUILDING COMPANY, a corporation, and PEARL ASSURANCE COMPANY, LTD.,

APPELLEE.

**APPELLEE'S BRIEF ON SECOND APPEAL**

M. PERELLI-MINETTI

704 South Spring Street  
Los Angeles 14, California

H. L. MULLINER

817 Continental Bank Building  
Salt Lake City 1, Utah

*Attorneys for Appellee.*



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**In the  
United States District Court  
Southern District of California  
Central Division**

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WESTERN LOAN AND BUILDING  
COMPANY, a corporation,

*Plaintiff,*

vs.

F. S. LACK, PEARL ASSURANCE  
COMPANY, LTD., a corporation,

*Defendants.*

**In Equity**

**No. 1301 Civil O'C**

F. S. LACK,

*Plaintiff,*

vs.

WESTERN LOAN AND BUILDING  
COMPANY, a corporation,

*Defendants.*

**In Equity**

**No. 84 S.D. Civil O'C**

**STATEMENT**

The claims here relate to:

1. Damages for alleged delay in conveying hotel property to Lack.
2. Interest on part of the insurance money paid into Court by the defendant Pearl Assurance Company, Ltd., and on prior appeal award to Mr. Lack.

There is quite a little confusion in appellant's brief as to what was actually involved in these two cases.

The one case here involved, 84, was an action by Lack, as plaintiff, for a judgment compelling Western Loan and Building Company to specifically perform its alleged covenant to repair the hotel under the twenty-day provision of the contract, or to pay, "in lieu thereof," damages. This complaint, after alleging the earthquake and the refusal of Western Loan and Building Company to repair, recites (R. 33) that on December 31, 1940, which was the last day of the term of six years provided in the lease and option agreement, Lack had tendered payment of the purchase money to Western Loan and Building Company as the purchase price

"when the defendant shall deliver to the plaintiff a deed for said hotel property, *when said damage caused by said earthquake has been repaired*, but that defendant has refused and failed and neglected at all times and does now refuse, fail and neglect *to repair* the same \* \* \* to the damage to this plaintiff in the sum of \$100,217.87. That there is no other adequate remedy at law.

WHEREFORE, plaintiff prays judgment against the defendant

1. For a decree of specific performance of Exhibit "A" and that the defendant be ordered to *repair the damage* done to the hotel property by said earthquake and that said insurance money be used to defray the cost of said repairs, together with damages to this plaintiff for loss of profit by reason of non use of said hotel property, *or in lieu thereof*;
2. Damages in the sum of \$100,217.87 together with interest thereon at the rate of 7% per annum from August 15, 1940 until paid in full." (R. 34).

This is the theory of Case No. 84. This issue took up most of the time of the trial Court, and it was decided that Western Loan and Building Company was under no duty to make the repair, and so found by the Court. This Court in its decision on this matter says:

“Western was under no obligation to make such repairs or to pay the cost thereof.”

There is no other suit or claim for specific performance for restitution or for damages.

The other case, No. 1301, was brought by Western against the insurance company to collect the earthquake insurance on the property. In this case, Mr. Lack was interpleaded, to determine which of us was entitled to the insurance money. In his answer, he claimed to be entitled to it by reason of the said twenty-day covenant in the lease for repair of the building, if repairs could be made in twenty days. Any other repairs were by the contract to be made by him.

The insurance company answered and tendered the amount of the insurance, \$28,067.87, into Court to be paid to the party determined to be entitled thereto. In this case we alleged that the option in Lack's lease had not been exercised, but we offered to deed the property and accept payment as if it had been exercised.

This offer was refused by Lack, who claimed we must repair and restore the property.

This Court, on appeal, found that he had exercised the option, mainly by the mention in the insurance policy furnished to Western that he had a secondary interest by

reason of a "contract to purchase." That issue is, therefore, settled. On that, the opinion of this Honorable Court says:

"Having exercised the option, Lack was obligated to pay Western the purchase price of the property (\$35,000), plus interest, less quarterly payments made by him, as provided in the contract, and Western was obligated to convey the property to Lack upon receipt of the purchase price, plus interest, less such quarterly payments. Lack's quarterly payments prior to May 18, 1940, were sufficient to pay \$15,750 of the purchase price, plus interest to July 1, 1940, leaving an unpaid balance of \$19,250. Thus, of the \$28,067.87 for which Pearl was liable under its policies, \$19,250 was payable to Western, and \$8,817.87 was payable to Lack.

"Lack claimed the entire \$28,067.87, including Western's \$19,250. The ground of his claim was that, by the terms of the contract, Western was obligated to repair the damage to the building at its own expense, but had failed to do so; that Lack, therefore, was entitled to make such repairs at Western's expense; and that such repairs would cost more than \$28,067.87. The claim, in so far as it related to Western's \$19,250, was properly rejected; for, as said before, the damage to the building could not be repaired in 20 working days. Therefore Western was under no obligation to make such repairs or to pay the cost thereof.

Pursuant to this decision, and after the first three motions and petitions of Lack hereinafter referred to for a modification or change of the decision of this Court so as to allow damages and interest, the mandate went down.

It said:

"this cause be, and hereby is remanded to the said

District Court with directions to enter judgment awarding to Western Loan and Building Co. \$19,250 of the \$28,067.87 deposited by Pearl Assurance Co. in the registry of the court, awarding to Lack the balance (\$8,817.87) of said \$28,067.87 and requiring Western Loan and Building Co. to convey to Lack the Hotel Dunlack building in Brawley, California, the land on which the building stood,  
\* \* \* ”

It was ordered that we pay the costs on appeal, and these were taxed at \$1122.97. That was all.

After the recital as to cost, the mandate in the printed formal portion thereof recited:

“You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as according to right and justice and the laws of the United States ought to be had.”

It will be noted that although the findings and decree (R. 76-94) recited in considerable detail the several issues that were present, and direct findings are made on these issues, and notwithstanding the agreement of the parties here on the pre-trial hearing, that the principal issue was our failure to repair the property as shown in the record 230-231, 258-259, 129-130 and 134, that all but one of these findings were undisturbed, and the only modification directed was as above specified in the mandate.

The trial Court was reversed only on the one finding that Lack had not sufficiently indicated his intention to exercise the option. The other matters in the opinion and mandate of allotting to us \$19,250.00 of the insurance



money, as payment on the property, and the order to convey upon such payment, followed, necessarily, the reversal on this one issue.

The remaining issues stand as decided and, of course, cannot now be changed.

All of the mandated directions of this Court to the trial Court have been ordered by the trial Court and complied with by us:

(a) delivery of deed of conveyance to Lack, with title policy (15-17)

(b) payment to him of Lack's portion of the insurance money (16-17)

(c) payment of costs on appeal (17)

The matters here claimed, while repeatedly presented to this Court and here refused, were likewise refused by the trial Court. They were refused by this Court on good grounds, as we shall attempt to show. But whether so refused or not, the orders of this Court are final and conclusive. They were, of course, refused by the trial Court because it could not change its original findings and decree in any respect, except as ordered by this Court, and this Court had not, but had repeatedly refused to so order it.

### **BRIEF AND ARGUMENT**

This appeal will be briefed and argued upon three points as follows:

1. That both the matters of alleged damages and interest have been heretofore presented to this Court and decided adversely to the appellant.

2. That there is no basis for, or right to, damages for delay or refusal to convey the property.

3. That appellant is not entitled, to recover from Appellee, interest on money deposited with the Clerk of the District Court by the insurance company.

## I

### PRIOR ADJUDICATION

These two matters have been heretofore presented to this Court by four different motions, and in the main brief of appellant, and have been heretofore adjudicated and settled.

(1) Immediately after the decision of this Court came down, Lack filed a motion to this Court to direct the "terms of the remittitur" so as to cover these matters.

(2) This was followed by a petition for "modification of opinion and decree" so as to include them.

(3) Thereafter, an application was made to change the second petition to a "petition for rehearing" covering the same.

(4) After these motions had been considered and denied and the remittitur sent down, appellant filed here a fourth "motion to recall mandate and for modification of judgment."

All of these motions are in the Record and before this Court. Furthermore, they were briefed, and the same line of authorities cited as now. The authorities then, and now, cited indicate that this Court had jurisdiction and authority to act upon each and all of these motions, and it did.

We call attention, also, to the fact that in his main brief on the first appeal, Lack argued that he was entitled to damages against us "to be found by a referee" and set forth a heading: "Damages for Delay with Specific Performance are Recoverable." Also another heading: "Special Damages of Lost Profits May be Recovered."

Under these headings, commencing at page 45 of the main brief, there were cited sixteen different cases and authorities. So that this contenttion was thus additionally made to this Court on the first appeal. (See also Lack's Reply Brief, first appeal, p. 16).

Appellant is not here appealing from, and, of course, he cannot appeal from, the denial by this Court of the demand for further modification of the original judgment. This Court did not make these modifications in its opinion, and repeatedly denied Lack's motions to change its decision so as to make them. Thus, these matters are adjudicated and settled.

The authorities cited on these motions, and now cited, indicate that this Court had the jurisdiction and power to pass upon these matters, and the authority of this Court so to do, was never questioned. On the other hand, this Court ruled upon each and all of these motions and denied them. The trial Court, of course, could not include these matters in its decree, to conform its findings and decision to the opinion of this Court without attempting to overrule these decisions of this Court. It could not change its former judgment, without direction from this Court. It had no jurisdiction or authority so to do.

The following cases, some of which have been cited by appellant, emphasize the jurisdiction of this Court to pass upon these matters as they were presented; also the duty of the trial Court to correct its judgment only in the respects directed by this Court, and denying its authority or jurisdiction to otherwise alter said judgment. Incidentally, some of these point out that no interest can be charged on money deposited into the registry of the court under the circumstances here.

*Thornton v. Carter*, 109 Fed. (2d) 316 is not exactly in point, because that case was remanded for "further proceedings," and not for such specific modifications, as here. The mandate, however, said nothing about interest or damages by delay. It was contended that the trial Court should have allowed these. On the second appeal, the court held to the contrary.

The appellate Court stated also that the judgment of the trial Court, save only in the respects modified by the appellate Court, was final and conclusive. The opinion says:

"Since, however, a final judgment upon the merits concludes the parties as to all issues which were or *could have been decided* \* \* \* it is obvious that such judgment of this Court on appeal puts all such issues out of the reach of the trial Court."

It was held that the trial court was correct in refusing interest on the money deposited with the Clerk of the trial Court and which had been withdrawn pending the first appeal by one of the parties.

The case cites a number of authorities on the point above quoted, and that the decision of the trial Court, except as expressly modified, is *res judicata*. Among the cases cited is *Guettel v. U. S.*, 95 Fed. (2d) 229; 118 A.L.R. 1060.

We agree with the statement of appellant supported by the Goldwyn case cited from 287 Fed. 100 that the trial Court is without power to do anything contrary to or in addition to that set forth in the mandate of the appellate Court.

*Clark v. Hot Spring Electrical Co.*, 76 Fed. (2d) 918 is a case very much in point. The case was appealed and modified in certain respects. The principal one was that the mandate directed the trial Court to make allowance for certain cost of preparation of a mortgage foreclosure proceeding involved. Upon its remand, application was made for the allowance of interest pending the appeal. The trial Court refused to allow this, it not being expressly ordered by the mandate. On second appeal, it was sustained. The opinion said:

“The trial Court had no authority to alter or review the decree in any other particular. *Gains v. Rugg*, 148 U. S. 228; 37 Law Ed. 432. The trial Court was without authority to modify the decree, after affirmance, by adding to it a provision as to interest or by changing the allowance of counsel fees. \* \* \*

*Groves v. Sentell*, 66 Fed. 179 is a good case upon the matters here presented. It indicates that the printed stock phrase in mandates reciting that the trial Court is to make such execution of the mandate as is “according to right and justice” adds nothing to the expressed modifications



in the opinion and mandate. It also discusses the question of the right to interest where the suit is over money due from a third party and deposited into court, and the litigating parties are attempting to determine their respective interests therein. It holds that none can be collected.

This case involved a mandate from the Supreme Court, and while it recited "the decree is reversed," it contained a specific mention of the matters to be changed by the trial court, just as did the mandate in the case at bar. Certain sums were to be paid to certain named parties, with certain interest specified and certain costs as to some. Funds had been paid into the Clerk of the court. The opinion points out that as to such funds, just as in this case, that the judgment and mandate "was not a personal decree against any of the parties to the suit, except for the sum of \$349.00 costs."

The proposition contended for was that one of the parties, who had paid the money into court, pending the suit, should pay interest thereon, "and they further prayed that this matter be referred to a Master to determine what further amount may be due these respondents by complainant as interest until final payment \* \* \* and also what costs are due these respondents."

The opinion points out that these matters were not contained in the mandate, but it must, nevertheless, be presumed that the Supreme Court considered them. The following propositions are stated:

"We are bound to presume that the Supreme Court, in their decree, passed upon this issue, and neither from the mandate nor from the opinion rendered

by the Court can we infer any intention to leave undecided any issue in the case or in anywise refer the same to the Circuit Court for future disposition.

\* \* \* \* \*

“When the Supreme Court prescribed the decree to be entered in the Circuit Court in such specific terms as the record shows, there was nothing left for the Circuit Court to do in the premises but to enter the decree prescribed by the Supreme Court, and execute the same.”

It seems to us, just as conclusively here, that all questions now in this case were considered and settled on the first appeal, and that these questions cannot be injected again, or allowed at this time.

*Mulhens and Kroppf v. Mulhens*, 48 Fed. (2d) 206  
*Kosack v. U. S.*, 54 Fed. (2d) 72.

These cases have heretofore been cited to this Court by appellant. They also hold that any change or enlargement of the appellate court's opinion here, or of its mandate, were within its jurisdiction; and that application to it was the proper procedure, and, that its denial constitutes a disposition of the questions so raised.

Appellant here, at the opening of his brief (p. 4) says:

“It is unfortunate for Lack that this Court did not see fit to follow the procedure outlined in *Mulhens and Kroppf v. Mulhens*.”

There is no reason to believe that this Court did not follow the procedure outlined. Petitions were made to it as in that case, and it considered and denied the petitions of appellant. This Court also, it is to be assumed, considered the argument presented in Appellant's briefs on

the main appeal for the very modifications of the original judgment now contended for.

Other authorities might be cited, and other will be noticed under the additional points.

Appellant has clearly confused this issue by citing cases in which the judgment of the trial Court was entirely reversed and where cases were remanded with directions to the trial Court to take further proceedings not inconsistent with the opinion of the appellate Court. There was no authority given to open these cases for further trials.

## II DAMAGES

A good deal is said here by appellant about a suit for "specific performance." The suit of that nature was 84, one to require us to specifically perform the alleged duty to repair the building wherein Lack asked for specific performance, or, in the alternative, damages for our failure to so perform. Any matter of proof of damages, or statements on the trial with reference thereto, related to this case and contention.

The word "restitution" is used by appellant throughout the brief, without being tied in to any specific thing involved here, and with considerable confusion as to what is intended. This brief will be given further notice. However, at this point we will discuss point two more affirmatively.

So far as possession of this property is concerned, Lack has never been deprived of it. He alleges (R. 16) that he took possession of said property January 1, 1936 and "has been ever since the said January 1, 1936 and now is

in possession of said property \* \* \*'' The only reference to any intended surrender of possession is the allegation (R. 31) that he tendered it to us for the sole purpose, and conditioned upon, our repairing the same as he alleged we were required to do. He further testified at the trial that he lived in the hotel after the earthquake (R. 650) and that he continued to lease portions of the premises (R. 56; 649). We have never been in possession of any of this property since January 1, 1936.

Now as to our duty to convey, it is needless to recite that we were under no obligation to convey title until the property was paid for, as in the lease and option agreement provided.

Lack's tender on the last day of the six-year period of the contract, to make payment, was specifically conditioned upon our repairing and restoring the building. As pointed out in our main brief, such a tender containing such condition, not required by the contract, was invalid as such.

This Court, on appeal, found that Lack had sufficiently indicated his intention to exercise the option, principally by recitals in the insurance policies, so that that matter has been settled. But this Court did not hold that we were required to deed the property prior to the payment in accordance with the option agreement. It held the contrary, and said:

“Having exercised the option, Lack was obligated to pay Western the purchase price of the property (\$35,000.00), plus interest, less quarterly payments made by him as provided in the contract, and Western was obligated to convey the property to Lack *upon receipt of the purchase price*, plus interest, less quarterly payments.” (11).

The opinion then sets up the amount that Lack would owe if he were entitled to exercise his option as \$19,250.00. The opinion then provided that this may be paid out of the insurance money deposited by the insurance company. The opinion then points out:

“Lack claimed the entire \$28,067.87, including Western’s \$19,250.00. \* \* \* The claim in so far as it related to Western’s \$19,250.00 was properly rejected; for as said before, the damage to the building could not be repaired in twenty working days.” Neither party could act, to carry out the judgment while the case was on appeal.

It is thus apparent that the payment to us of the balance of \$19,250.00 out of the insurance money was never tendered by Lack. On the contrary, he alleged and maintained that we were entitled to none of it, as the opinion of this Court clearly points out.

The only right or authority that either of us ever had to carry out this option or apply this portion of the insurance money to the payment of the balance of the purchase price of this property came after and as a result and effect of the opinion of this Court. Lack would not accept it. This opinion (p. 12) directed the trial Court “to enter judgment awarding to Western \$19,250.00 of the \$28,067.87 deposited by Pearl in the registry of the Court, awarding to Lack the balance \$8,817.87) \* \* \* and requiring Western to convey to Lack all the property herein above mentioned.”

As recited in the decree of the trial Court entered pursuant to said mandate, this was promptly carried out.



Much is said about our having "breached our contract" to convey and "damages for failure to perform." We desire to point out to this Court again, that we repeatedly offered to permit Lack to exercise this option or to make conveyance upon the balance of the purchase price "as if he had exercised his option." He refused throughout, unless we would first repair the building. In a letter dated September 27, 1940, we called his attention to our offer to do this as a means to giving him all the protection that we could give. We called attention to his conversation with our Mr. Richardson and the proposition then suggested, which was stated:

"We would be willing to permit you to have the amount of the insurance money over and above the amount that would have been required to pay us out, if your option to purchase thereunder had been exercised while the lease was in effect, and that we would also convey our interest in the property to you \* \* \*" (See also R. 747).

In our pleading his Case No. 1301 (paragraph IX, R. 8) we alleged that we had made this offer, and set it out again and said:

"Plaintiff has thus tendered protection of any possible interest said defendant F. S. Lack may have had in said policies or the property covered thereby, and to thus restore him to the status he would have had, if he had not defaulted on the lease and option agreement and had exercised the option therein provided."

We then specifically tendered to Lack the balance of the insurance fund and invited him to file his acceptance.

Appellant Lack rejected our offers and alleged in his answer (paragraph VIII, R. 14-15)

“In answer to paragraph IX of plaintiff’s complaint, this defendant admits that the plaintiff made such an offer, but in that respect this defendant alleges that said \$28,067.87 is about \$15,000 short of being sufficient to completely pay for the damage done to said premises by said earthquake and that the plaintiff has at all times herein mentioned and does now refuse, fail and neglect to repair said damage or to pay for the same except as contained in said offer as alleged in paragraph IX of said complain.”

See also the stipulation of Mr. Schaefer at the pre-trial hearing (R. 238) where Lack’s counsel refers to the offer of the Western Loan and Building Company to convey to Lack the hotel and where Mr. Schaefer expressly refuses the offer:

“Mr. Schaefer: Now, Mr. Mulliner says in this paragraph that what he offered Mr. Lack was that they deduct whatever was due them and give him the deed and hand them back a damaged hotel. We will admit that he made an offer, but we also want to stipulate that we rejected it.” (27)

While it is probably the law that in an action for specific performance to convey property, damages may be claimed, and, by an equity court allowed, for failure and refusal to make conveyance, it certainly is not the law that a party can be assessed with damages for failure to convey where tender of conveyance is offered in accordance with the agreement between the parties, and that offer directly and emphatically refused.

*Bu-Vi-Bar Petroleum Corp v. Krow* (10 C.C.), 40 Fed. (2d) 488; 69 A.L.R. 1295. This case discusses an analogous situation where there had been an offer to proceed and

perform a contract on the one side, and a rejection and repudiation on the other side. The case holds that, while such rejection is unretracted, by one party, the other party is under no duty to perform.

“A continued willingness upon the part of the injured party to receive performance is an indication that, if the repudiator will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an irrevocable election not to treat the renunciation as a breach. Section 1334 supra. The refusal to retract amounts to a continuation of such renunciation. *Zuck v. McClure*, 98 Pa. 541.”

Following this case, at 69 A.L.R. 1303, there is a note. It is not directly in point, but cites a number of cases supporting the proposition next above stated.

See also *Midwest Elc. Co. v. Midwest Gen. Elc. Sup. Co.* (8 C.C.), 36 Fed. (2d) 213.

Referring now to the Lack brief on this, several inaccurate statements are contained in the opening portion thereof. It is said that this Court held that “Western had breached its contract in refusing to convey the hotel.” We find no such holding, but only the statement that Western would be obligated to convey, upon “receipt of the purchase price.”

The brief then admits that some delay was caused by litigation as to the repairs. It is then wrongfully stated that “Western has unlawfully withheld the property from Lack, causing very heavy damage.” The statement is then made that Lack in his original pleadings demanded specific performance, together with damage for loss of profits.

If he did, it was before the trial Court, and before this Court on the first appeal, and is settled. Neither Court has further jurisdiction to review these matters.

The alleged payments made by Lack referred to on page 6 were largely for operating materials during the approximately 5½ years he operated. No competent evidence was offered on this, and this related to damages for our failure to repair. It is not material here.

The claim that he could have repaired the hotel in 1941, may be questioned. In any event, he was never deprived of that right. We always contended that it was not only his right, but his duty to repair. He had possession.

The argument on page 8 is entirely erroneous. The statement in the printed portion of the mandate commanding the trial Court to proceed "in accord with the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had," added nothing to the specific directions of the mandate. There appears to be no authority to the contrary. It simply means that the directions in the mandate are "according to right and justice," and are to be carried out. So far as we have been able to find, substantially such language is contained generally in mandates from appellate Courts, both Federal and State, whether they contain specific directions as to certain issues, or an order of general reversal and/or re-trial.

Since the remainder of the brief refers to interest also, we will review that in connection with the next point.

### III INTEREST

This matter of interest has likewise been presented to and disposed of by this Court. It was in all four petitions. In addition to that, a mere statement of the facts with relation to the fund here, when considered in connection with the decision of this Court, and the absence of any direction in the mandate, would appear to eliminate all the authorities cited by appellant. In awarding a portion of the insurance fund to Lack, this Court said:

“Thus, of the 28,067.87 for which Pearl was liable under its policies, \$19,250 was payable to Western, and \$8,817.87 was payable to Lack.”

Then after reciting that Lack erroneously claimed the whole \$28,067.87 and that his claim as to the \$19,250.00 was properly rejected, this Court, in conclusion, says:

“The case is remanded with direction to enter judgment awarding to Western \$19,250 of the \$28,067.87 deposited by Pearl in the registry of the court, awarding to Lack the balance (\$8,817.87) of said \$28,067.87.”

We were not sued by Lack in Case 1301 on an indebtedness due him from us. It may be conceded that in a case where a suit is brought by one party against another upon an obligation to pay money, and it is found that there was a sum of money due at a certain time, the court may and should include in the judgment interest from the date on which the sum was due. Such cases as this, are relied upon by appellant.

Here, we sued the insurance company for this fund, and they deposited it in Court. In that suit, we indicated



that Lack may have an adverse claim and interpleaded him. He asserted such, and the above mentioned portion of the fund was by this Court finally awarded to him. We had already offered it to him, and that offer had been rejected.

This Court did not order any money judgment entered against us in favor of Lack, and there was never any pleading upon which such an order or judgment could have been made. It is true that after the award to us, and before the appeal, the Clerk, after deducting his fee of 1%, paid the money to us.

When the appeal was afterward taken, we, of course, could not use the money, which had been placed in *custodia legis*. We had to hold it awaiting the disposition of it by this Court. No supersedeas bond was filed on the first appeal. Any withholding or delay was not our fault. As was pointed out in *Groves v. Sentell*, supra., if there was an error, it was the trial Court's error. We restored Lack's portion to the Court's custody immediately.

There is no more reason why we should pay Lack interest on his \$8,817.87 than that he should pay us interest on the \$19,250.00 which he, through the trial and throughout the appeal in this Court, claimed to be entitled to. The trial Court had no authority to grant Lack's motion to charge us with interest. It was not in the mandate, and his petitions theretofore in this Court, had been denied.

*Clark v. Hot Springs Electrical Co.*, supra, directly holds that the trial Court was without authority to allow interest.

*American Surety Co. v. River*, 269 Fed. 137 (8 C.C.) furnishes additional light upon this question. There the trial court had entered a judgment in a direct suit on an insurance contract without allowing interest. The appellate court modified the judgment by directing the allowance of interest on the amount found due. The trial Court added interest to the date of its original judgment. Mandamus was brought to compel the addition of interest to the date of mandate.

The holding of the Court is reflected in the syllabus as follows:

“A mandate issued by an Appellate Court directing the modification of the decree appealed from, by including therein interest on the sum recovered by the complainant from the time it becomes entitled thereto, *held* to require the allowance of interest only to the date of the original decree, which as so modified, was affirmed and not to the date of the mandate.”

*Groves v. Sentell*, 66 Fed. 179, *supra*, points out that the awarding of the funds deposited in Court was not a personal judgment against any of the parties to the suit. It holds that interest was not payable thereon.

*Kirkpatrick v. Great Am. Ins. Co.*, 299 S.W. 943 holds unsuccessful claimant of funds in registry of court in interpleader not liable for interest thereon.

#### **Appellant's Authorities:**

In citing authorities, the Lack brief confuses somewhat the question of interest with that of restitution. We have read the authorities cited. Most of them appear to have no application here. These include the cases previously

cited to this Court, and on the same contentions to the trial Court. We find among them no authority supporting the contention that the trial Court under this mandate had authority or jurisdiction to either add interest or assess damages. These cases at best, appear to indicate only, that upon a partial reversal or modification of a judgment, it is the function of the appellate Court to order, or refuse to order such restitution, as its decision may indicate. This was done.

Commencing on page 10, 2 Cal. Jur. cited, contains simply a statement that if an erroneous judgment is entered and reversed, the "appellate Court" may upon reversal make complete restitution of the property lost by the erroneous judgment.

*Bertholdi v. St. Louis RR Co.*, 80 Fed. (2d) 32 involved claims for overcharges on freight. The railroad company's property went into the hands of a receiver, and it was attempted to charge him, as trustee, and make the claims a preferred claim as against the mortgage holder. That was the issue in the case, and the decision was in favor of the receiver.

*Freeman on Judgments*, Sec. 482 simply indicates on the subject of restitution that upon reversal, "the plaintiff is not required to restore a sum in excess of that which he has received under his judgment."

*B & O RR Co. v. U. S.*, 279 U. S. 781 simply held that on rates, excess amounts paid the railroad company for shipping, as assessed by the Interstate Commerce Commission, interest could be collected from the date of the excess payments. There appears to have been an entire

reversal of this case for further proceedings, and the opinion indicates that the mandate was controlled by the appellate Court.

*Kreske and Co. v. Wingate*, 102 Fed. (2d) 740, which is apparently cited in criticism of this Court, for not recalling its mandate, is a case which casts doubt upon whether Lack's remedy, if he has any, is by second appeal in this case. The opinion there said:

“If the trial Court has mistaken our meaning \* \* \* mandamus \* \* \* is the classical remedy.”

However, we do not raise the point, as we think this Court has already decided everything now attempted to be brought before it.

Appellant here indicates in its brief that this Court thought that the trial Court would construe its mandate as covering interest and damages. If Lack had so thought he would not have so immediately and persistently demanded that this Court include these matters in its mandate. If this Court had so thought, it would have upon such petitions doubtless said so, as did the appellate Court in the *Kreske* case. That the trial Court did not consider that the mandate authorized him to add interest and damages, was indicated to this Court as set out at page 3 of appellant's brief, when its motion and affidavit was filed here reciting that the trial Court did not so understand the mandate. This Court then knowing this, denied appellant's motion to “recall mandate,” etc.

The *Kosack* case cited at page 11 of the brief has already been cited by us.

We have no argument with the authorities cited on pages 12, 13 and 14, nor do we think that they have any application here.

In the Second Point, on page 15, the brief says, "Western having breached its contract to convey," etc., this begs the question. There was no such breach. Immediately after this Court authorized us to use \$19,250.00 of the insurance money as payment for the property, we made conveyance, with title policy furnished, as recited in the judgment of the trial Court. (15-17).

The authorities cited under this are to the effect that where there is breach of a duty to convey, equity may award damages for failure to convey in the same action. We have already conceded that an equity Court has this power.

Appellant continuously overlooks the decision of this Court that we had no duty to repair this building; that Lack had this duty under the general provisions of the contract; that the law is now settled, and under it as settled, he could have proceeded at any time to do this. We insisted that he do it, and offered to turn over the whole of the insurance fund for that purpose and, in addition thereto, to put up a portion of the additional money required. (R. 747).

The trial Court has held that it could not have been repaired by either one of us within the term of the lease. No one can tell when this hotel might have been repaired under the conditions which arose, or what Lack might have made out of it after the time of its repair, if this



could have been accomplished. One point is certain, we did not have the duty to repair it.

It is equally certain that any loss of profits was not due to the mere passing of a deed, but was due to the damage to the hotel by the earthquake.

As pointed out in our petition and brief for a rehearing (p. 11) herein, we were never repaid the \$3777.40 of taxes that we advanced for Lack, and that while he put no money in this property other than that taken out of it by him as profits from it, that he did gain from it a very substantial sum, while we have lost about half of the \$100,000 we put up to build the hotel. (See our main brief p. 2).

The cases cited by appellant at pages 19 to 24, are upon the propositions that damages for delay may be recovered in specific performance actions, and with this general principle, we have no dispute. Cases are also cited under the proposition that where there is a repudiation by defendant of his contract, damages may be recovered. There is nothing of this character involved in this case, and no damages occurring by reason of any repudiation on our part.

It is next suggested, at page 25, that Lack's pleadings in Case No. 84 are sufficient to entitle him to damages. We have already pointed out that these were considered by this Court on the first appeal, and this relief refused.

Coming then again to the question of interest, at page 27, appellant cites again the B & O R. R. Co. v. U. S., 279 U. S. 781 and the Bertholdi case, *supra*, and other cases, to the effect that where there is a contract to pay

money, and judgment is entered thereon, interest may be included. This we do not deny.

**Trial Costs, and Clerk's 1% Deduction:**

The incidental questions of costs in the trial Court and the deduction by the Clerk, of the trial Court, of 1% on the insurance money deposited, were urged with the two questions above mentioned in the previous petitions and motions of Lack filed in this Court, and in the proposed decree after mandate in the trial Court. They are suggested in the "notice of appeal here." In the argument, however, they appear to be abandoned, and will, therefore, be only briefly noticed.

The Clerk deducted his regular 1% on the deposit, which amounted to \$88.17 on Lack's portion of the deposit, and \$195.00 on Western's portion. The contention is intimated that we should stand his deduction and ours too.

As above pointed out, there was no judgment against us in favor of Lack for either of these amounts. This Court simply directed that the trial Court enter a judgment "awarding to Western \$19,250, \* \* \* awarding to Lack the balance (\$8,817.87) \* \* \*"

The awards were so made, but due to no action by either party, each of us received 1% less on each award. This difference was not withheld by us, but by the Clerk. And if there is any claim by either of us, it appears that it is not against the other party here. There is no basis or reason why we should restore this amount to Lack.

On the matter of trial costs, as already pointed out, the main issue, and some other issues of the case, were

decided in our favor. Practically, if not all, witnesses that were called, were called on the main issue as to our duty to repair. In the trial Court, because we had claimed the furniture and furnishings under our bill of sale, and these were awarded to Lack, the trial Court in entering its judgment said:

“Neither party is entitled to costs, and no costs are awarded.”

On the single issue as to whether Lack had sufficiently indicated his intention to exercise the option, this Court reversed the trial Court. This left the issues as originally framed and tried, as being decided partly in favor of one party and partly in favor of the other party to the litigation, so that neither could claim the right to assess trial costs as against the other.

This judgment that neither party be awarded costs has never been appealed from or changed in any manner. And it is now beyond the jurisdiction of either Court to change it.

Furthermore, both of these claims have repeatedly been presented to this Court, along with the other matters above discussed, and have been decided adversely to appellant and adjudicated and settled. The discussion under Point I applies to these, the same as to damages and interest.

## CONCLUSION

It, thus, appears that the matters now attempted to be raised by this appeal were raised, by appellant, on the first appeal. The judgment as entered, and then appealed from, was not reversed or modified in these respects. That the same contention that is now attempted on this appeal as to the modification of the original judgment in these respects, was presented to this Court in the main briefs, and in the four different motions. That this Court had jurisdiction, and decided said matters adversely to appellant by the denial of said motions. It also appears that such decisions were just under the facts as shown by the record, at that time and now.

It is further evident that in the absence of a modification of the trial Court's judgment, by this Court, and a direction to change or modify said judgment, the trial Court had no authority, power or jurisdiction to make the changes and modifications which it is now contended that Court should have made, and on which this appeal is based.

It is, therefore, submitted that the appeal is without merit, and that the judgment as entered by the trial Court on the mandate should be affirmed.

Respectfully submitted,

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